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Supreme Court of the United States

October Term, 1955

No. 982 113

HELEN G. SEITZ and ARTHUR MacGREGOR SEITZ, III, an infant under the age of fourteen years, by WILLIAM H. TALLYN, as Guardian *ad Litem*,

Petitioners,

vs.

JOHN E. TOOLAN, ISABEL HAYES, HUYLER E. ROMOND and ISABELLE S. SEITZ,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioners respectfully ask this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, entered March 5, 1956, which judgment affirmed the order of the District Court for the District of New Jersey dated April 4, 1955 as amended by the order dated September 7, 1955.

Opinions Below

The opinion of the District Court granting summary judgment in favor of the defendants and dismissing both amended complaints and the opinion of the Court of Appeals affirming the order of the District Court have not

yet been reported. A copy of each opinion is hereto annexed as an appendix.

Statement of Grounds of Jurisdiction

1. The judgment of the Court of Appeals was rendered and entered on March 5, 1956.

2. No application for rehearing was made.

3. The jurisdiction of this Court is invoked pursuant to 28 U. S. C., Section 1254.

Questions Presented for Review

1. Was the motion for summary judgment made by the defendants prior to the interposing of an answer premature?

2. Did the courts below err in granting summary judgment and dismissing both amended complaints, when there was a genuine dispute with respect to all of the material facts?

3. Did the courts below err in holding, as a matter of law, that the dismissal of the prior contempt proceedings was the result of a settlement?

4. Was it error on the part of the courts below to dismiss the cause of action for malicious prosecution by deciding as a matter of law the questions of successful termination of prior proceedings, probable cause and malice in favor of the defendants or were those questions for determination by a jury?

5. Was it error on the part of the courts below to dismiss the cause of action for false imprisonment and abuse of process?

6. Did the courts below err in dismissing the conspiracy cause of action in each amended complaint?

Statutes and Rules Relied On

Rule 8(c) of the Federal Rules of Civil Procedure:

> "(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation."

Rule 56(b) and (c) of the Federal Rules of Civil Procedure:

> "(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
>
> (c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

New Jersey Rule 2:8-2(a):

"A criminal contempt, except as provided in Rule 2:8-1, shall be prosecuted on notice, and if it occurs in a cause it shall be prosecuted in the cause in which it occurs. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the contempt charged. The notice may be given orally by the judge in open court in the presence of the person charged with contempt or by an order to show cause or an order of arrest."

Statement of the Case

The instant action was instituted by Helen G. Seitz on her behalf and on behalf of the infant plaintiff Arthur MacGregor Seitz, III. Thereafter an amended complaint was served on behalf of the plaintiff Helen G. Seitz (App. 135a to 150a, incl.) and an amended complaint was also served on behalf of the infant plaintiff (App. 150a to 163a, incl.) by William H. Tallyn, who was appointed guardian *ad litem* for the purpose of prosecuting this action on behalf of the infant plaintiff.

Prior to the amendment as aforesaid a motion for summary judgment was made by the defendants Toolan and Hayes (who were the only defendants named in the original complaint) to dismiss the complaint (App. 8a). However, by an order of the District Court, dated May 3, 1954 (App. 83a to 85a, incl.) the amended complaints were made subject to the same motion on behalf of all of the defendants above named.

The amended complaint on behalf of the plaintiff Helen G. Seitz contains four causes of action. The first cause of action is for malicious prosecution; the second cause of action is for false imprisonment; the third cause of action is for abuse of process; and the fourth cause of action is for conspiracy to commit various torts, among them the torts referred to in the first three causes of action.

The first cause of action of the plaintiff Helen G. Seitz, above referred to, alleges in substance the following: that the defendants John E. Toolan and Huyler E. Romond are members of the bar of the State of New Jersey; that the defendant Isabelle S. Seitz is the daughter-in-law of the plaintiff Helen G. Seitz, and the defendant Isabel Hayes is the mother of said defendant Isabelle S. Seitz; that on January 14, 1952, the defendant Isabelle S. Seitz, with the aid and assistance of her mother, the defendant Hayes (then being in contempt of Court for having abducted the infant plaintiff from the State of New Jersey on November 9, 1951, in violation of the custody order of Judge Burton, dated June 6, 1949 and the specific restraining order of Judge McLean, dated August 6, 1951), and the defendants Toolan and Romond, her attorneys, maliciously, and without probable cause, instituted a criminal contempt proceeding against the plaintiff and others, by a petition filed in the civil suit pending in the Superior Court of the State of New Jersey, Somerset County, Chancery Division, bearing docket number 5004-50 161/660, wherein one Arthur M. Seitz, Jr., was the plaintiff and the defendant Isabelle S. Seitz in this action was the defendant in that action; that in said petition the defendant Isabelle S. Seitz maliciously and falsely stated that she verily believed that the plaintiff herein, together with other persons, conspired to violate a certain custody order issued by the Superior Court of the State of New Jersey (of which order she was at that time herself in contempt) in which the custody of three minor children (being the grandchildren of the plaintiff herein and the children of the defendant Isabelle S. Seitz and the plaintiff's son) was awarded to the defendant Isabelle Seitz with right of visitation by the father (of which right he had been deprived since Novem-

ber 9, 1951, due to the abduction of his children) and that this plaintiff aided and abetted her son, the husband of said defendant Isabelle Seitz, in violating the said order; that based upon said allegation the defendant Isabelle Seitz, with the aid and assistance of the remaining defendants, requested that the plaintiff herein, together with others, should be adjudged guilty of criminal contempt of the Superior Court of the State of New Jersey and should be dealt with by said Court accordingly; that said petition was signed by the defendant Romond (who was fully aware of the violation by Isabelle Seitz of the aforesaid order, having been present at the numerous hearings following the disappearance of two of the children, and of the efforts of the father to obtain custody of the third, deserted child), as a member of the firm of Toolan, Haney & Romond, of which the defendant Toolan is also a member, and was verified by the defendant Isabelle S. Seitz. Said first cause of action further alleges that an order to show cause based upon said petition was issued by Judge Donald H. McLean, a Judge of said Superior Court of the State of New Jersey on January 15, 1952, directing the plaintiff and her husband and son to show cause why they should not be adjudged in contempt of said Superior Court of the State of New Jersey; that said order to show cause was not served on the plaintiff herein but was served on one Walter Gottschalk, Esq., who never represented the plaintiff but represented the son of the plaintiff herein in the action above referred to; that, notwithstanding the fact that the plaintiff was not served with said order to show cause, she voluntarily appeared on an adjourned date of said order to show cause and advised the Court that Arthur MacGregor Seitz, III, the infant grandson of this plaintiff, whose alleged abduction by his father was the basis of the contempt proceedings, was not in her possession at that time and had not been in her possession but was living with his father; that said hearing was continued to a later date, without any testimony having been taken thereat with respect to the merits; that on the day following said hearing, and prior to the adjourned hearing or any hearing on the merits of the contempt proceeding, the defendant

Romond prepared an order for the issuance of warrants for the arrest of this plaintiff, her husband and son; that said order was signed on January 23, 1952 by Judge Donald H. McLean, and that on the same day, pursuant to said order, a contempt warrant was issued by the Clerk of said Superior Court in which, among other things, it was stated that "Helen G. Seitz is unlawfully in possession of an infant, Arthur M. Seitz, III, in violation of a judgment entered in the Supreme Court of New Jersey, Chancery Division * * *;" that said contempt warrant was issued without any order adjudicating the plaintiff in contempt and was based solely on the order dated January 23, 1952, which order did not set forth any grounds for the arrest of the plaintiff herein; that said contempt order was issued without personal service of the order to show cause on this plaintiff and without prior order adjudicating this plaintiff in contempt and by reason thereof deprived the plaintiff of due process of law; that the aforesaid order to issue a warrant of arrest was presented by the defendant Romond to Judge Donald H. McLean at the insistence and instigation of the defendant Hayes, acting together with the other defendants. Said first cause of action further alleges that as a result of the contempt warrant issued as aforesaid the plaintiff Helen G. Seitz was apprehended by a state trooper of the State of New Jersey and was incarcerated first in the Somerville Barracks and then in the Somerville Jail, and was finally released on bail; that said arrest was made immediately after the plaintiff had voluntarily appeared in the aforesaid Superior Court, at the insistence and instigation of the defendant Hayes, acting together with the other defendants. Said first cause of action further alleges that on June 10, 1952, Judge Donald H. McLean appointed one Morris Spritzer as Special Prosecutor for the contempt charges; that on January 23, 1953, to wit, more than one year after said contempt proceeding was instituted, said Morris Spritzer moved to dismiss the criminal contempt charges against the plaintiff herein and hat pursuant to said motion Judge Donald H. McLean, on February 20, 1953, dismissed the order to show cause dated January 15, 1952, insofar as it referred to this plaintiff and her husband and the charges of contempt mentioned there-

in, and discharged the plaintiff from bail; that no appeal has been taken from the said order dated February 20, 1953, and the time to take an appeal therefrom had expired before the commencement of this action and said contempt proceedings so commenced against this plaintiff have been fully and finally terminated in favor of the plaintiff by final order of said Superior Court of the State of New Jersey; that by reason of said unlawful and malicious prosecution this plaintiff was deprived of her liberty, was subjected to great humiliation, pain and distress in mind and body, was injured in her character and reputation, was made the subject of public comment and notoriety in the public press and elsewhere, and was injured in her good name and reputation in the community and among her associates (App. 135a to 140a, incl.).

The second cause of action is based upon the same set of facts and in addition to the facts so set forth in the first cause of action it is alleged that the petition made by the defendants to punish this plaintiff for contempt was barren of any facts connecting this plaintiff with the alleged abduction of the infant plaintiff and that the Superior Court of the State of New Jersey was without authority and without jurisdiction to issue the contempt warrant against this plaintiff; and that by reason of the false arrest the plaintiff was deprived of her liberty and was subjected to great humiliation (App. 140a, 141a).

The third cause of action is likewise based upon the same state of facts as the first and second causes of action and, in addition thereto, it is alleged that the defendants' petition to punish this plaintiff for contempt was made by the defendants for an ulterior purpose, to wit, to compel the son of the plaintiff herein to return the infant plaintiff to the custody of the defendant Isabelle Seitz and that by doing so the defendants abused the processes of said Superior Court of the State of New Jersey (App. 141a to 143a, incl.).

The fourth cause of action in substance alleges that commencing in 1947 and continuing to the date of the amended complaint the defendants entered into a common

scheme and conspiracy to oppress, defame and ruin this plaintiff mentally, physically and socially; to cause her to be maliciously prosecuted and falsely arrested; to abuse the processes of the courts of the State of New Jersey in prosecuting said malicious charges against this plaintiff and causing her arrest; and to interfere with the administration of justice in the courts of New Jersey, with the intent to defeat and deny the constitutional and legal rights of this plaintiff (App. 143a to 145a, incl.). In support of said conspiracy count the amended complaint alleges various overt acts, which appear at pages 145a to 148a of the appendix.

The amended complaint of the infant plaintiff alleges, in substance, that commencing in 1947, and continuing up to January 5, 1952, all of the defendants herein entered into a common scheme and conspiracy to oppress, harass, harm and ruin the infant plaintiff mentally, physically and socially, to interfere with his health and mental, physical and educational development, to destroy his love, respect and affection for his father, to illegally obtain for the defendant Seitz the custody of said infant plaintiff, to abuse the processes of the courts of the State of New Jersey in obtaining the illegal custody of the infant plaintiff for the defendant Seitz, and to interfere with the administration of justice in the courts of New Jersey, with the intent to defeat and deny the constitutional and legal rights of the infant plaintiff herein.

The amended complaint of the infant plaintiff alleges various overt acts of said conspiracy, the most important of which are to the effect that the defendants forcibly removed, or caused to be removed, the infant plaintiff from his father's care in a vicious and brutal manner; that the defendants, by the introduction of a typewritten copy of a certain anonymous letter into the custody litigation, and by various other acts, illegally obtained the custody of the

infant plaintiff for the defendant Seitz; ill treated the child while they had him under their power and control, and deprived the child of the love and affection of his father and paternal grandparents by removing the infant plaintiff for a considerable period of time from the State of New Jersey in contempt of an order of the Court, denying the father of the infant plaintiff the right of visitation given to him by order of the court, all of which tended to adversely affect the infant plaintiff to the extent that one of the judges in the above referred to custody proceedings remarked that said infant plaintiff was liable to "become one of the worst delinquents this country ever had."

The amended complaint of the infant plaintiff, in conclusion, alleges that by reason of the said conspiracy he was deprived of the love, affection and care of his father and the love and affection of his paternal grandparents, was subjected to great humiliation, pain and distress in mind and body, and was constantly harassed by the numerous proceedings of which he was the subject, and was, in every respect, adversely affected in his health and in his mental, physical and educational development (App. 150a to 163a, incl.).

The affidavits and other papers submitted in support of the motion for summary judgment (App. 9a to 83a incl.), as well as the plaintiffs' affidavits in opposition to said motion dated March 31, 1954, May 13, 1954 and May 14, 1954 (App. 85a to 134a incl., 164a to 183a incl., 183a to 189a incl.) will be hereinafter discussed.

The District Court, by an opinion of Chief Judge Forman, granted the motion for summary judgment and dismissed both amended complaints (App. 198a to 217a incl.).

On May 4, 1955, an order was entered based on the said opinion of Chief Judge Forman and summary judgment was entered dismissing both amended complaints (App. 224a, 225a).

An appeal was taken by the plaintiffs from the dismissal of both amended complaints. Said appeal was dismissed by the Court of Appeals for lack of jurisdiction. However, after the order and judgment dismissing the amended complaints, as aforesaid, was amended by Chief Judge Forman, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure (App. 225a, 226a) the plaintiffs again appealed from said judgment and order by notice of appeal dated September 22, 1955 (226a, 227a). On March 5, 1956 the Court of Appeals affirmed the order of the District Court dated April 4, 1955 as amended by the order dated September 7, 1955.

Jurisdiction of the Courts Below

The District Court had jurisdiction under 28 U. S. C. § 1332(a)(1). The Court of Appeals had jurisdiction under 28 U. S. C. § 1291.

Reasons for Allowance of the Writ

The District Court granted the motion for summary judgment in disregard of Rule 8(c) of the Federal Rules of Civil Procedure which requires a defendant to set forth his affirmative defenses in answer form.

The Courts below departed from the well established Federal law that a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure cannot be granted when there is, as in this case, a genuine dispute of material facts. Federal Courts have always been zealous not to deprive a part of a trial on a genuine dispute of material facts. They have considered this procedure as a drastic remedy, and have required strict compliance with Rule 56.

United Meat Co. v. *R. F. C.*, 174 F. 2d 528, 85 U. S. App. D. C. 9;

Wyatt v. *Crittenden*, 113 F. 2d 170, 72 App. D. C. 163;
Parmelee v. *Chicago Eye Shield Co.*, 157 F. 2d 582;
Hahn v. *Bucyrus-Erie Co.*, 8 F. R. D. 315;
Tague v. *Delaware L. & W. R. Co.*, 5 F. R. D. 323;
Sarnoff et al. v. *Ciaglia*, 165 F. 2d 167.

This Honorable Court in *Fountain* v. *Filson et al.*, 336 U. S. 681, 69 S. Ct. 754 stated:

> "Summary judgment may be given, under Rule 56 only if there is no dispute as to any material fact."

The decisions of the Courts below contravene both Rule 56 and the decisions of this Honorable Court, as well as those of various Circuit and District Courts. It will be shown that there were many issues of fact involved in this case which could not properly be determined by way of summary judgment. As a matter of fact, there was a genuine dispute as to all material facts in the instant proceedings and it was clearly error on the part of the Courts below to grant a motion for summary judgment.

POINT I

The motion for summary judgment made by the defendants prior to the interposing of an answer is premature.

The instant motion for summary judgment was made by the defendants, Isabel Hayes and John E. Toolan, after they were served with the original complaint, without interposing any answer to said complaint. After all of the defendants were served with both amended complaints they still did not answer but relied on the motion for summary judgment previously made by the defendants Toolan and Hayes.

Under the facts of the instant case the defendants should have been compelled to interpose an answer to the amended complaints before they were permitted to make a motion for summary judgment. In support of said proposition petitioners, in the District Court, relied on *Hooven, Owens, Rentschler Co.* v. *Royal Indemnity Co.*, 1 F. R. D. 526, and still rely on that authority. The District Court, in discussing said case, agreed that in said case the Court had denied the defendant's motion for summary judgment as premature upon the ground that no answer was interposed by the defendants. However, the District Court expressed its opinion that said case was peculiar on its facts since the defense of the delayed filing of the complaint was not based upon the statute of frauds but upon a contractual limitation. This distinction, however, has no bearing on the decision in the *Hooven* case, *supra;* whether the limitation in said case was contractual or statutory is highly immaterial, and even whether the defense related to any limitations or constituted any other affirmative defense is likewise immaterial, as appears from said opinion.

The gist of said opinion is that if an affirmative defense is necessary to defeat the plaintiff's action then the answer containing said affirmative defense should be interposed prior to the making of a motion for summary judgment.

On the other hand, the case of *Miller* v. *Hoffman*, 1 F. R. D. 290, cited by the District Court as 1 F. R. D. 209, is not in point since in that case an answer had been interposed by the defendants containing affirmative defenses and the Court merely held that a motion for summary judgment was proper before an answer was filed to the counterclaim. The Court in that case expressly stated that the case was at issue while in the instant case issue has never been joined up to the present time. The instant motion for summary judgment is therefore premature, despite the fact that Rule 56 (b) of the Federal Rules of

Civil Procedure permits the making of a motion for summary judgment at any time.

Rule 56(b) must be read together with Rule 8(c) which reads, in part, as follows:

> "In pleading to a preceding pleading, a party shall set forth affirmatively * * * res judicata * * * statute of limitations * * * and any other matter constituting an avoidance or affirmative defense."

Since the defendants, in their brief submitted in the District Court, raised several affirmative defenses, such as *res judicata*, privilege, statute of limitations, those defenses should have been pleaded affirmatively.

In view of the fact that it is uncontested that the contempt proceedings against the plaintiff Helen G. Seitz were determined in her favor, the defendants' main defense is to the effect that said dismissal was the result of a settlement. That said defense should have been set forth affirmatively in an answer interposed by the defendant appears clearly from the case of *Halberstadt* v. *New York Life Insurance Co.*, 194 N. Y. 1, 21 L. R. A. N. S. 293, which case was cited by the District Court.

That the failure of the defendants to interpose an answer prior to the making of the motion for summary judgment created an anomalous situation is best shown by the fact that one of the defendants interposed a separate counterclaim which, under normal procedure, should have been part of an answer, together with all other affirmative defenses.

The failure to interpose an answer is clearly prejudicial and detrimental to the plaintiff since the various papers submitted in support of the motion do not show which allegations of the complaint are at issue and which affirmative defenses the defendants intend to interpose.

Petitioners are of the opinion that the erroneous decision of the District Court must, at least to some extent, be attributed to the confusion created by the failure to serve an answer prior to the making of the motion.

It appears from the foregoing that the decisions of the Courts below are clearly in conflict with the decision in *Hooven, Owens, Rentschler Co.* v. *Royal Indemnity Co.*, cited *supra*. Although some jurisdictions may have followed the decision in *Miller* v. *Hoffman*, cited *supra*, this Honorable Court has never determined the question whether a motion for summary judgment may be made prior to the interposing of an answer where said motion relies upon affirmative defenses. Petitioners are of the opinion that this is an important question of federal law which should be settled by this Honorable Court. Prior to the recent amendment of Rule 56 no motion for summary judgment could be made prior to the joinder of issue. Petitioners are informed that this is still the law in most states and it should be the law in the Federal Courts in cases of this nature if Rule 56 is properly interpreted together with Rule 8(c) of the Federal Rules of Civil Procedure. Since a motion for summary judgment is not in the nature of a common law demurrer it seems essential that the issues be defined by the interposing of any affirmative defenses upon which the defendant intends to rely, before such defendant should be permitted to make a motion for summary judgment.

POINT II

The Courts below erroneously held that the dismissal of the contempt proceedings was the result of a settlement.

The District Court properly states that in order to establish a cause of action for malicious prosecution three elements must be present—(a) successful termination of the prior prosecution in favor of the present plaintiff; (b) absence of probable cause for the institution of the prior prosecution; and (c) malice as a motive for the institution of the prior prosecution. The writer agrees with said statement but respectfully submits that the existence or nonexistence of those elements was clearly a question for the jury and the Court below should not have deprived the plaintiffs of a jury trial by disposing of issues which were not within the province of the Court.

The Court of Appeals for the Third Circuit has clearly defined the function of a motion for summary judgment in the case of *Sarnoff et al.* v. *Ciaglia, supra,* stating, at page 168, as follows:

> "In Merchants Indemnity Corporation of New York v. Peterson, 3 Cir., 1940, 113 F. 2d 4, 6, we stated that 'summary judgment may not be given under Rule 56 of the Rules of Civil Procedure if there be an issue presented as to the existence of any material fact.' This principle was reiterated in Toebelman v. Missouri-Kansas Pipe Line Co., 3 Cir., 1942, 130 F. 2d 1016, in which we said, 130 F. 2d at page 1018: 'Upon a motion for a summary judgment it is no part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried. Ramsouer v. Midland Valley R. Co., D. C. Ark. 1942, 44 F. Supp. 523.

> All doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for a summary judgment. Weisser v. Mursam Shoe Corporation, 2 Cir., 1942, 127 F. 2d 344 [145 A. L. R. 467].' See also Doehler Metal Furniture Co. v. United States, 2 Cir., 1945, 149 F. 2d 130, 135."

It follows from said ruling that summary judgment cannot be granted if there is an issue presented as to the existence of any material fact and it follows further from said ruling that all doubts as to the existence of an issue in the instant case should have been resolved against the defendants.

In the instant case, however, the Court below departed from its own ruling in *Sarnoff et al.* v. *Ciaglia* and granted summary judgment although there are issues presented as to the existence of many material facts.

Although the District Court stated that the successful termination of the prior prosecution is one of the elements of malicious prosecution, the Court stated that a dismissal brought about by a compromise is not such a termination and, without going into any facts, concludes that in the instant case there was such a compromise or settlement.

The papers submitted by the defendants themselves show that there was no settlement and therefore the District Court should have found, as a matter of law, that there was a successful termination of the prior proceedings. However, the question of successful termination was at least a question of fact which could not have been decided upon affidavits.

The entire record is barren of any stipulation of settlement or any other compromise agreement, or of any recital in any orders of the Superior Court of any settlement. As a matter of fact the order of dismissal of the contempt

proceedings against the plaintiff Helen G. Seitz and her husband, Arthur M. Seitz, Sr. (App. 78a), does not contain a single reference to a settlement but merely indicates that the contempt proceedings were dismissed against the plaintiff and her husband and that both of them were discharged from bail. In this connection it is significant to note that the order of the Superior Court dismissing the contempt proceedings states that a motion had been made by Morris Spritzer, who had been previously appointed to prosecute the said contempt proceedings, to dismiss said proceedings and that the Court had *heard and considered the argument of counsel and, being satisfied that good cause existed for the dismissal,* had made the order dismissing said proceedings. If there had been any stipulation of settlement between the parties it is clear that the order would have been based upon said stipulation and would have recited the same and no hearing would have been necessary to satisfy the Court that good cause existed for the dismissal.

In an endeavor to prove this plaintiff's consent to a settlement the defendants cite a letter written by said plaintiff to Judge McLean on February 6, 1953. The excerpt quoted from said letter (App. 81a), standing alone, shows that the plaintiff did not know of any settlement and did not consent to any settlement. It is significant to note that the plaintiff, in said letter, asked the Court to sign the orders dismissing the charges *against her and her husband,* without asking the Court to dismiss the charges against the defendant Isabelle Seitz or consenting to a dismissal of such charges. A reading of the entire letter shows that while it refers to several proceedings between the parties, nowhere does it refer to the consent of the plaintiff Seitz to a mutual dismissal of contempt charges against all parties. As a matter of fact, it specifically objects to a mutual dismissal, stating that whereas the plaintiff Helen G. Seitz and her husband are innocent of any contempt "it would

neither make sense nor be fitting to dismiss, * * * or rather * * * to condone the criminal contempt, twice attempted kidnapping and the desertion of the third infant * * *." Said letter, in full, reads as follows:

"'Arthelart Farm' at
Bernardsville, N. J.
February 6, 1953.

Judge Donald H. McLean,
Superior Court Chancery Division,
Trenton State House Annex, N. J.

In accordance with Mr. Gottschalk's and my own belief that you intended having a hearing with Mr. Romond re: the signing of certain orders of dismissal in accordance with Mr. Morris Spritzer's decree as specially appointed prosecutor to establish the truth of my husband's and my own claim that we had been falsely accused and falsely arrested—I, as I was voluntarily entering your court-room without having been acquainted or served with any papers informing me of what crime I was presumed to be guilty—I arrived in New Brunswick to be present at the stipulated hearing only to find that you and Mr. Romond had come to some decision in a matter of great concern to Mr. Gottschalk's client and to myself personally and as Attorney Pro Se. You informed me on Wednesday morning that you did not intend to sign any orders—it seemed because of some unknown determination on the part of Mr. Romond, and that it would be up to Mr. Gottschalk and myself to appear again in Court Friday after inquiring in Trenton for an appointment.

Accordingly I discussed the matter with Mr. Spritzer and then with Mr. Gottschalk (which costs money) and we decided that we did not believe that

it is necessary for either Mr. Gottschalk or myself to appear in Court to settle the matter of the dismissal for the Contempt charges which had been investigated by Mr. Spritzer and which he had found to be without foundation. This was not surprising since your own detailed version differs entirely from that sworn to by Mr. Romond and both his and yours differ from the perjurious affidavit presented by Isabel Seitz on January 15, 1952 upon which the Warrants which brought about our false arrest and the Mandate you made which forced an honorably discharged veteran father of more than five years of active service to become a fugitive from an inhuman decision which it was impossible for any father or decent man to obey since a small boy's physical and mental safety was involved. I do not believe that you are aware of the fact that the version given you and set forth by you in the Court transcript is entirely false, and that therefore, since you obviously must have founded and made your Mandate because you believed the version set forth by you to be true and according to facts, the Mandate you issued is also a false one and should be at once declared null and void by you, and those guilty of placing you in the position of having caused great shame and distress and hardship to a father who honorably served his country and therefore could hardly have willingly become a fugitive or failed to protect his oldest born little son, should be publicly chastized, since they actually kidnapped two children and deserted a third thus showing their contempt for the Court Order of May 1949 when custody of the three Seitz children was awarded to Isabel Seitz living in the house of the maternal grandmother Hayes who had sworn before Advisory Master Rogers in 1948 that she would see that the

children were properly taken care of and brought up, but failed to fulfill her promises.

Mr. Rogers stated in his conclusions that if the father's contentions that Isabel Seitz was not capable of bringing up the children had not been contradicted by the affidavits presented by Isabel Hayes, Mr. Toolan and Isabel Seitz and others, Isabel Seitz must have been held 'incompetent and incapable' of caring for or properly rearing any children, and Mr. Burton's Decision (giving the children to Isabel Seitz living in the attic rooms of her mother's 'elegant' 26 room house with the three Seitz children in 'sufferance and on the charity' of the maternal grandmother, as Isabel states under oath) 'has been affirmed by three men in the Appellate Division' as your statements in the Court Transcripts show. Mr. Burton's Opinion was made without the benefit of the Court Transcripts despite his admission in Court on July 25, 1949 that his memory is remarkably faulty and not to be relied upon. Mr. Burton's Opinion is contrary to the facts in the Transcript Record which shows that Isabel Seitz did not hesitate to commit blackmail to secure marriage—and that she did not hesitate to commit perjury on the stand throughout her testimony, attempted thereby, without a single thought of what it would mean to her children's futures to label their father falsely as being a blackmailer. By this attempt she forced the exposure that she, and not the father had been the blackmailer. Nor did Isabel Seitz hesitate to open the receptacle of one of her witnesses who was on the stand and unable to protect her belongings, and despite the protest of the witness, she stole various articles from the receptacle and handed them to her attorney, Mr. Toolan, who, quickly, believing them of value to his

cause, interrupted his examination of the witness to place them into evidence. It is needless to give the reason for their disappearance from the case, or the refusal of the Court to permit them to be placed into evidence by the father's attorneys—the testimony of Isabel Seitz and Mrs. Hayes before Mr. Burton reeks with perjury just as the affidavits of Mrs. Hayes, Isabel Seitz and Mr. Toolan are perjurious which Mr. Romond and Mr. Toolan submitted to Advisory Master Rogers, nor do these or other sustaining affidavits make even a pretext of 'sustaining' Isabel Seitz' contention that she is capable of caring for her children—they all state that Mrs. Hayes' house is a fine house and Mrs. Hayes a fine housekeeper but not Isabel Seitz. In fact the contents of some of these affidavits actually prove that Isabel Seitz is guilty of perjury—but on these Mr. Rogers awarded three children to Isabel Seitz in March 1948, and on these and on the perjurious Opinion of Mr. Burton, the Honorable Judge McLean stated he bases 'his reasoning' in the Seitz v. Seitz. And on January 18, 1952 Judge McLean states that the oldest of the three Seitz children, Greg, unless he is removed from those who have just attempted to kidnap the children from the State in order to avoid being found guilty of contributing to the delinquency of this boy and are guilty of other equally serious contempt,—'will become one of the worst delinquents this country ever produced'.

I am sure you can understand that since my husband and I were charged with a crime of which we were not guilty and therefore were unable to obey the Mandate made by you and were investigated by Mr. Spritzer and found innocent, it would neither make sense nor be fitting to dismiss, or

rather since it is a fact, for you to condone the criminal contempt, twice attempted kidnapping and the desertion of the third infant by people who not only had, but will continue to thumb their noses at State Laws and Orders made by a Court, and who actually made the statement while in the act of perpetrating further crime, that you, Judge McLean 'would take care of' whatever wrongs they were contemplating.

At the same time, since the father of the children, who was denied the Right of Visitation granted him by Court Order by Judge Burton, in June 1949, by the further Contempt of Isabel Seitz for many months, could not possibly have been placed into any position whereby he would be guilty of disobeying a Court Order much less a Mandate except for the deliberate, wilful and planned kidnapping of the children from the State by the custodian, which acts, of contempt according to the Rules governing custody cases automatically are cause for change of custody, the question of Justice arises, for how can the father be held in Contempt for something brought about by the custodian's criminal acts and evidence of indifference to Law and Order and the Rights of the children and their father?

Therefore, if Isabel Seitz and her mother are to be set free of their deliberate contempt and their wilful contempt is condoned by you, you can hardly not dismiss the forced contempt of the father especially as you yourself are guilty of making the Mandate upon the presentations of persons who appeared before you with 'unclean hands' steeped in attempted kidnapping, who did not voluntarily return when you so ordered, but only after the Florida New Year high life was over. In several transcripts it is shown that you insist it is a 'Rule

of Law' that persons with unclean hands cannot ask for relief from the Court. In addition, Isabel Seitz and her mother forced one child into delinquency and gutter habits. How far the other children have sunk into vicious ways, is now not known; while the father, far away from home, all alone undid the viciousness taught and bred in the child by the mother and maternal grandmother. You, yourself, stated for the Record that if she is unfit for one child she is unfit for all three. Times have grown worse since then—November 12, 1948.

I therefore ask that you consider the fairness of what I have placed before you, and to be so gracious and Judgely as to sign the orders dismissing the charges against my husband and myself and order that the bail be refunded by the County Clerk of Somerset County in the sum of $1500 thereby discharging us from custody.

Yours very truly,

HELEN G. SEITZ."

It appears clearly from said letter that the plaintiff Helen G. Seitz asked the Court to sign a dismissal order against her and her husband only because the contempt charges against them were without foundation and were so found by Mr. Spritzer. Moreover, Mrs. Seitz, in said letter, emphasized the fact that the petition to punish her for contempt was perjurious, and that the warrants for the false arrest of herself and her husband were based on said perjurious petition. Towards the end of said letter Mrs. Seitz reiterates her innocence of any contempt and asks that such contempt charges be dismissed as a matter of right and fairness, based upon Mr. Spritzer's findings.

A copy of said letter was sent to Mr. Spritzer and, undoubtedly, because of that fact, Mr. Spritzer cannot and

does not state that the plaintiff herein consented to any settlement. All he states is that the plaintiff did not object to the dismissal and therefore "assented" to it.

In most of the cases cited in C. J., at page 1026, relied upon by the Court below, there was a settlement in a criminal proceeding for larceny or other property crime, in which the defendant made restitution, whereupon the proceedings were dismissed. Such a situation cannot be compared, by any stretch of imagination, with the facts of the instant case. The plaintiff herein did not pay any money nor furnish any other consideration in order to obtain the dismissal of the contempt proceedings. Assuming, without conceding, that Mr. Gottshalk, who never represented the plaintiff Helen G. Seitz, had consented to the dismissal of the contempt proceedings against the defendant, Isabelle Seitz, the plaintiff herein was definitely not a party to such consent. However, nowhere does it appear that the contempt proceedings against Isabelle Seitz were dismissed as a result of any compromise agreement.

The papers submitted in support of the motion for summary judgment show clearly that the defendants were not able to prove that the dismissal was the result of a settlement. In any event, the allegations contained in the verified amended complaint and the plaintiff's affidavits create a genuine issue of fact which could not have been resolved on a motion for summary judgment.

The plaintiff, Helen G. Seitz, in her affidavit dated March 31, 1954 (App. 85a to 134a, incl.), under the heading "The Spritzer Affidavit," categorically denied that the dismissal of the contempt proceedings against her was the result of any settlement (App. 126a to 131a, incl.). In said affidavit Mrs. Seitz strongly objected to the insinuation that she had "traded" her freedom and her husband's freedom as a consideration for the freedom of the defendant Isabelle Seitz. The affidavit further states that she had never consented, either orally or in writing, to the dis-

missal of the contempt charges against the defendant Isabelle Seitz and that the defendants had set forth a short excerpt from her letter addressed to Judge McLean for the sole purpose of misleading the Court.

In conclusion the plaintiff, in said affidavit, stated as follows:

> "I submit that the affidavits of Messrs. Romond and Spritzer are false and misleading and are only introduced because of Mr. Toolan's realization of how important in this case this false arrest was, with all its disastrous consequences, particularly because of the delay of one year and he is doing everything in his power to disguise his disgraceful conduct in connection therewith and to minimize his participation" (App. 131a).

If the District Court had taken into consideration the said affidavit it could not possibly have arrived at the conclusion that there was no issue of fact with respect to said alleged settlement. Said affidavit, together with the amended complaint and the further affidavits submitted by the plaintiff, raised a bona fide issue as to the termination of the contempt proceedings in favor of the plaintiff in this action, and that issue should not have been taken away from the jury by summarily dismissing the plaintiff's amended complaint.

Moreover the decision of Judge Forman in the instant case is in direct conflict with his own decision in *French* v. *United States Fidelity & Guaranty Co.*, 88 F. Supp. 714, where he stated at page 721 as follows:

> "Detention is unnecessary, however, where the prosecution is criminal, Hammill v. Mack International Motor Truck Corp., et al., supra, 104 N. J. L. at page 553, 141 A. 775. The withdrawal of the complaint, Hammill v. Mack International Truck Corp., et al., supra, 104 N. J. L. at page 553, 141 A. 775, or the

judgment of acquittal or nolle prosequi, Apgar v. Woolston, 43 N. J. L. 57, 64; Stein v. Schmitz, 137 N. J. L. 725, 727, 61 A. 2d 260, terminates a criminal prosecution."

Since the dismissal in the instant case was in the nature of a nolle prosse, said dismissal would still be a successful termination of the prior proceedings according to the decisions of the New Jersey State Courts and the ruling of Judge Forman in the *French* case cited *supra*. Thus, it is the law of New Jersey that the mere "assent" of a defendant to a dismissal cannot estop said defendant from instituting an action for malicious prosecution. Any defendant in a criminial proceeding, although innocent, would readily assent to the dismissal of said proceeding, and could not be expected to object to such dismissal. Since the defendants do not allege plaintiff's approval of a settlement but merely an "assent" to the dismissal of the contempt proceedings instituted against her, the granting of the motion for summary judgment in favor of the defendants was clearly erroneous.

POINT III

The questions of probable cause and malice were questions of fact for determination by a jury.

The District Court stated that the facts in connection with probable cause stand uncontroverted so that the issue of probable cause is a question of law and not one for determination by a jury. It is difficult to understand how the District Court arrived at such erroneous conclusion. Chief Judge Forman, in his opinion, speaks of the abduction of the infant plaintiff herein as though that were an admitted or proven fact. The fact is, however, that the plaintiff Helen G. Seitz, throughout the whole proceeding, has emphatically denied that the infant plaintiff was abducted by

his father and that, if such abduction did take place, she had anything to do with it. The true facts in connection with the so-called abduction appear at page 116a of the appendix, where the plaintiff, in her sworn affidavit, states that the infant plaintiff, when he saw his father, suddenly ran down the porch, jumped into his father's car, and pleaded to be taken away quickly by his father. Under such circumstances there could be no abduction of the infant plaintiff by his father.

The District Court clearly invaded the province of the jury in finding that the facts warranted the belief that the plaintiff was guilty of contempt. In order to reach this erroneous conclusion the District Court uses the plaintiff's own testimony that she had supplied food to her grandson while he was quartered in her son's apartment. The writer respectfully submits that the supplying of food to a grandchild of tender age, under any circumstances, cannot be deemed a contempt of Court; and more particularly so, since the plaintiff had stated unequivocally, at the hearing before Judge McLean, that the child was not in her possession, and had not been in her possession and that he was living in his father's quarters (App. 64a).

Under no circumstances, however, was the District Court justified in taking away from the jury the questions as to whether the father had abducted his infant son and whether the plaintiff herein had anything to do with such alleged abduction.

The authority is overwhelming that the questions of probable cause and malice in an action for malicious prosecution and false imprisonment are questions for the jury.

Daniel v. *Pappas*, 16 F. (2d) 880;
Boland v. *Ballaine*, 266 F. 22;
Pence v. *Melvin*, 38 F. Supp. 759;
Good Holding Co. v. *Boswell*, 173 F. (2d) 395, cert. den. 70 S. Ct. 55, 338 U. S. 815, 94 L. Ed. 493;

North British & Mercantile Insurance Co. v. *Feldman*, 149 F. (2d) 582;
Jillson v. *Caprio*, 181 F. (2d) 523;
Bucher v. *Krause*, 200 F. (2d) 576;
Seaboard Oil Co. v. *Cunningham*, 51 F. (2d) 321.

It appears from the foregoing that all three elements necessary to establish a cause of action for malicious prosecution exist in the present case, to wit: (a) a successful termination of the prior prosecution; (b) absence of probable cause for the institution of the prior proceeding; and (c) malice as a motive for the institution of the prior prosecution. It follows that the Court below should have denied the motion for summary judgment as a matter of law.

At the very least, there were bona fide issues of fact in connection with those three elements, the existence of which should likewise have led the District Court to deny the defendants' motion for summary judgment.

POINT IV

The Courts below erred in dismissing the cause of action for false imprisonment and abuse of process.

At the outset, it must be noted that the District Court, in its decision, treats the second cause of action, for false imprisonment, as if it were identical with the first cause of action, for malicious prosecution. The gist of said cause of action is that the Superior Court of the State of New Jersey was without authority and without jurisdiction to issue the contempt warrant against the plaintiff Helen G. Seitz; that said warrant was caused to be issued by the defendants herein without any probable cause; that the plaintiff, by reason of said warrant of arrest, was

deprived of her liberty and was subjected to great humiliation (App. 140a, 141a). How great was the humiliation suffered by the plaintiff by reason of such arrest, was fully described by the plaintiff in her affidavits dated March 31 and May 13, 1954 (App. 123a to 126a, incl., 172a, 173a).

The plaintiff, in her amended complaint, as well as in her affidavit dated May 13, 1954, had clearly shown that the petition to punish this plaintiff for contempt, made by the defendant Isabelle Seitz and instigated by the other defendants, upon which petition the order of arrest was based, charged the abduction of the infant plaintiff but was barren of any facts connecting the plaintiff Helen G. Seitz with the alleged abduction. The plaintiff had also shown that she was not a party to the custody proceedings in which her arrest on a contempt charge was ordered, and that therefore the Court was without jurisdiction to order her arrest. All of those facts constituted a proper cause of action not only for malicious prosecution but also for false arrest.

Earl v. *Winne,* 14 N. J. Rep. 119.

In refuting these arguments the District Court relied mainly on the New Jersey Rule 2:8-2(a), then in effect, which reads as follows:

> "A criminal contempt, except as provided in Rule 2:8-1, shall be prosecuted on notice, and if it occurs in a cause it shall be prosecuted in the cause in which it occurs. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the contempt charged. The notice may be given orally by the judge in open court in the presence of the person charged with contempt or by an order to show cause or an order of arrest."

Said rule, however, is no authority whatsoever for the holding of the District Court that an order of arrest can be issued against a person *not a party to the proceedings* without personal service and upon a petition which failed to allege any facts constituting a contempt on the part of this plaintiff.

Moreover, the District Court entirely overlooked the decisive fact that the plaintiff herein had voluntarily appeared on the adjourned date of the order to show cause and that it was therefore entirely unnecessary and improper to issue an order of arrest for her appearance thereafter. A reading of said New Jersey Rule 2:8-2(a) makes it crystal clear that a person may be given notice of a contempt charge either by order to show cause *or* by an order of arrest. Since the plaintiff herein, without being served personally with said order to show cause, appeared voluntarily, there was no reason, legal or otherwise, to issue an order of arrest for her appearance for the purpose of giving her notice of said proceeding. Contrary to the holding of the District Court, a judgment of conviction of contempt would have been a condition precedent to the issuance of the warrant for the arrest of the plaintiff herein. Since the plaintiff appeared voluntarily, on the return day of said order to show cause, to wit, January 22, 1952, the order by Judge Donald H. McLean, and the contempt warrant based thereon, entered one day thereafter, to wit, January 23, 1953, were made without any authority in law and the Superior Court, in issuing said order and warrant, clearly exceeded its jurisdiction.

The District Court further stressed the fact that the warrants were issued by the Superior Court contrary to the suggestion of the defendant Romond that the Court proceed by habeas corpus, and that the Superior Court, on its own initiative, decided to issue a warrant of arrest. The writer respectfully submits that this is entirely immaterial.

The Courts have constantly held that persons promoting certain proceedings, and setting the forces in motion, are not protected from the consequences of their acts and from liability for malicious prosecution and false arrest by hiding behind the robes of the Judge.

Wheeler v. *Nesbitt*, 65 U. S. 544;
Bryan v. *Congdon*, 86 F. 221;
Stainer v. *San Luis Valley Land & Mining Co.*, 166 F. 220;
Bergeron v. *Goldman*, 64 F. (2d) 917;
Castro v. *DeUriarte*, 12 F. 250.

The Courts have also constantly held that in an action for malicious prosecution and false arrest the perpetrator and instigator of the false imprisonment is as much responsible to the victim as the person who carries out the arrest.

Jillson v. *Caprio*, cited *supra;*
Carr v. *National Discount Corp.*, 172 F. (2d) 899;
Chesapeake & Potomac Telephone Co. v. *Lewis*, 99 F. (2d) 424;
Burlington Transportation Co. v. *Josephson*, 153 F. (2d) 372;
22 Am. Jur., 371;
C. J. S., False Imprisonment, Sec. 37, p. 550.

The defendants, in their petition to punish the plaintiff Helen G. Seitz for contempt of Court, had asked the Court that she be "dealt with by the Court accordingly" (App. 72a). They therefore cannot shirk responsibility by stating that the Court "dealt" with the plaintiff in a manner not expressly suggested by them and thereby escape all liability therefor.

Insofar as the third cause of action for abuse of process is concerned, the plaintiff alleged, in her amended complaint, that her arrest was caused by the defendants for

the sole purpose of forcing Arthur M. Seitz, Jr., the plaintiff's son, to bring the infant plaintiff into court, in spite of the fact that this plaintiff was never adjudicated in contempt of court. The writer submits that said allegation constitutes a good cause of action for abuse of process, under the ruling of *Earl* v. *Winne*, cited *supra*. The District Court, however, brushed said argument aside by stating that even if the ultimate purpose of the contempt proceeding and the *plaintiff's* arrest was to compel the return of the infant plaintiff, this was a lawful objective and amounted to a judicial attempt at the enforcement of the custody order. Said statement is not supported by any authority and fails to recognize the gist of the plaintiff's cause of action.

Assuming, without conceding, that the contempt proceeding instituted against the father of the infant plaintiff could have had the objective of compelling the return of the infant plaintiff, it was entirely unlawful to have this plaintiff arrested for the purpose of compelling the father of the infant plaintiff to bring said infant plaintiff back to New Jersey. Since the plaintiff Helen G. Seitz had no control whatsoever over said return, her only guilt could be her kinship to Arthur M. Seitz, Jr., her son and the person who was the subject of the contempt proceeding.

Moreover, said ruling of Chief Judge Forman is again based upon the erroneous assumption that it was uncontroverted that the infant plaintiff was abducted by his father, the son of the plaintiff herein. This, as has been hereinabove set forth, is not the fact.

POINT V

The Courts below erred in dismissing the conspiracy count contained in the amended complaint of the plaintiff Helen G. Seitz.

Judge Forman, in dismissing the conspiracy count, stated that said count must fail since there is no basis for the cause of action for malicious prosecution, false arrest, and abuse of process. Since it has been conclusively shown that those substantive causes of action are sufficient in law, under the authorities cited, and that the papers submitted in connection with the defendants' motion for summary judgment create an issue of fact for the determination of the jury, the dismissal of the conspiracy count by the District Court was likewise erroneous. However, the District Court dismissed the conspiracy count for the further reason that said count sounded in conspiracy to defame this plaintiff and that said conspiracy is barred by the statute of limitations since the statute of limitations for the substantive tort of defamation is one year. Said holding of the District Court is highly erroneous for several reasons.

(1)

The defense of the statute of limitations was never raised in any filed papers in support of the motion for summary judgment. It has been shown under Point I that pursuant to Rule 8(c) of the Federal Rules of Civil Procedure the defense of statute of limitations must be pleaded affirmatively and that therefore, under the authority of the *Hooven* case, cited *supra*, the defendants should have interposed an answer prior to the making of the motion for summary judgment.

Assuming, however, that District Court was correct in permitting the defendants to make a motion for summary judgment prior to interposing an answer, said defense of

the statute of limitations should have been raised in the affidavits in support of said motion. Even that was not done.

That the defendants had raised the defense of statute of limitations in their brief submitted in the District Court is entirely immaterial. The brief is not part of the record and it is, indeed, elementary that an affirmative defense cannot be raised by a legal memorandum.

(2)

Even if the period prescribed by the statute of limitations were one year, and even if the defendants had properly availed themselves of such statute, the starting point for said period of one year would not be 1949, as the Court below found, but would be 1953. An analysis of the conspiracy count shows that the conspiracy started in 1937 and continued to date (Par. 53 of the amended complaint, App. 144a, 145a), and that the last overt act referred to in said count was the illegal arrest of the plaintiff. The plaintiff was discharged from said arrest in 1953 and this is the controlling date under the case of *French* v. *U. S. Fidelity & Guaranty Co., supra,* relied upon by the District Court. The law is well settled to the effect that in an action for conspiracy the statute of limitations begins to run from the date of the last overt act alleged in the complaint.

Brown v. *Elliott,* 225 U. S. 392;
Pinkerton v. *United States,* 145 F. (2d) 252;
United States v. *Flynn,* 103 F. Supp. 925.

(3)

As heretofore stated, the District Court assumes that the plaintiff Helen G. Seitz had included in her fourth count of the amended complaint an allegation sounding in conspiracy to "defame" her. Based on said assumption the

District Court held that any action for defamation was barred by the statute of limitations. However, Chief Judge Forman entirely overlooked the fact that the allegation in the fourth cause of action of said plaintiff's amended complaint was much broader than as stated by him and included a conspiracy to oppress and ruin said plaintiff mentally, physically and socially (Par. 53 of amended complaint, App. 144a, 145a).

It is apparent that even if the statute of limitations referring to defamation were to apply to a conspiracy to defame, said statute of limitation cannot apply to a conspiracy count to oppress and ruin this plaintiff.

It is clear from the foregoing that the conspiracy count was not barred by the statute of limitations, aside from the fact that said defense was never properly raised by the defendants.

POINT VI

The Courts below erred in dismissing the amended complaint of the infant plaintiff.

The gist of the infant plaintiff's amended complaint is that all of the defendants, including the mother of the infant plaintiff, the defendant Isabelle Seitz, conspired to interfere with the family relationship between the infant plaintiff and his father, to deprive the infant plaintiff of his fatherly care, guidance and love, to evade or cause to be evaded the maternal obligations of said defendant Isabelle Seitz, and to invade the child's legal rights. The Courts have constantly held that such a cause of action is proper.

In *Daily et al.* v. *Parker*, 152 F. (2d) 174, the Court stated, at page 177, as follows:

> "Our conclusion, without going further into the matter, is that a child today has a right enforceable

> in a court of law, against one who has invaded and taken from said child the support and maintenance of its father, as well as damages for the destruction of other rights which arise out of the family relationship and which have been destroyed or defeated by a wrongdoing third party. Likewise, we are persuaded that because such rights have not heretofore been recognized, is not a conclusive reason for denying them."

To the same effect see:

Russick et al. v. *Hicks*, 85 F. Supp. 281;
Johnson v. *Luhman*, 330 Ill. App. 598, 71 N. E. 2d 810;
Miller v. *Monsen*, 228 Minn. 400, 37 N. W. 2d 543.

In the above mentioned cases the Court denied a motion to dismiss the complaint, which was based solely upon the fact that the defendants had induced the mother of the children involved to desert her children and thereby deprive the children of the love, affection and companionship of the mother. In the instant case, the defendants have deprived the infant plaintiff of the love, affection and companionship of his father by the wrongful acts referred to in the amended complaint of the infant plaintiff, which acts have detrimentally affected the mental and physical welfare of the infant plaintiff.

In the cases above referred to the Courts have brushed aside the arguments made by the defendants that such cause of action is without precedent and that if it did exist it was abolished by certain state statutes.

In *Daily et al.* v. *Parker*, cited *supra*, the Court properly held that the fact that a cause of action may be a novel one is no reason to dismiss it and if no precedent can be found the Court may indulge in lawmaking by decisions.

Whether such a cause of action has been abolished by statutes in other jurisdictions is immaterial insofar as the instant action is concerned. Neither the constitution nor the statutes of the State of New Jersey have abolished a common law action in conspiracy for the acts set forth in the amended complaint of the infant plaintiff.

A case directly in point is *State* v. *Bernard N. McFeely, et al.*, 25 Misc. 303. In that case the Court expressly held that the common law conspiracy to oppress and injure the plaintiff was not abolished by the statutory crime of conspiracy. On the other hand, the fact that the common law cause of action for alienation of affection is abolished in the State of New Jersey has no bearing on the instant action for conspiracy.

In *Russick et al.* v. *Hicks*, cited *supra*, the Court properly held that such a cause of action is distinguishable from a cause of action for alienation of affection. Moreover, as heretofore stated, the instant cause of action alleges that the infant child has been adversely affected mentally and physically by the acts of the defendants.

It appears from the foregoing that the amended complaint of the infant plaintiff is clearly sufficient in law. The District Court, however, dismissed said amended complaint mainly for the reason that the issues raised by said amended complaint were the same issues decided by the State Courts in the custody proceedings and were therefore *res judicata*. Said defense, as well as the other affirmative defenses, should have been pleaded affirmatively by the defendants, pursuant to Rule 8(c) of the Federal Rules of Civil Procedure, prior to the making of the motion for summary judgment. However, this was not done and the defendants had even failed to raise said defense in the affidavits in support of the instant motion.

Moreover, the instant action does not seek any relief in connection with the custody of the infant plaintiff but seeks damages for the conspiracy planned and carried out by the defendants, to the detriment of said infant plaintiff.

CONCLUSION

It is respectfully submitted that the various questions raised are of such importance in the administration of Federal Law that there should be an authoritative determination of the same by this Court. Accordingly, petitioners ask that this Court issue a writ to review the judgment of the Court of Appeals.

Respectfully submitted,

ARCHIBALD PALMER,
Counsel for Petitioners.

APPENDIX

Opinion of the District Court

FORMAN, *C. J.*:

Isabelle, daughter of Joseph and Isabel C. Stricker, married Arthur M. Seitz, Jr., son of Arthur M. Seitz, Sr. and Helen G. Seitz, on March 14, 1942. After Mr. Stricker's death in 1926, Mrs. Stricker had married Dr. Russell A. Hayes, whose widow she is since his death in 1946. Three children were born to Arthur and Isabelle Seitz—Arthur M., Pauline and Russell.

In the latter part of 1947 Arthur M. Seitz, Jr., alleging the constant interference of his mother-in-law, Mrs. Isabel Hayes, sought the intervention of the Court of Juvenile and Domestic Relations of Somerset County. Before the date scheduled for the hearing, on December 5, 1947, he and his wife, Isabelle S. Seitz, separated, and the latter took her youngest child (Russell) to her mother's home in Deal, New Jersey. (There is dispute as to which parent was the deserter.) On December 12, 1947, defendants John E. Toolan and Huyler E. Romond, attorneys for Isabelle S. Seitz, prevailed upon the Court of Juvenile and Domestic Relations not to proceed, stating that Isabelle S. Seitz intended to file for a divorce and custody of the three children. On December 15, 1947, Arthur M. Seitz, Jr. filed petition for divorce, alleging extreme cruelty.

On March 9, 1948, pending final hearing on the divorce, the Chancery Court of New Jersey awarded temporary custody of the three children to Isabelle S. Seitz, giving Arthur M. Seitz, Jr. the right to reasonable visitation and also giving him custody of Arthur M. Seitz, III (called "Greg" in the complaint in this case and so referred to hereinafter) on alternate week ends.

After final hearing, on December 17, 1948, that court dismissed the petition for divorce and awarded permanent and exclusive custody of all three children to Isabelle S. Seitz, restricting Arthur M. Seitz, Jr. from all visitation. Upon appeal by the latter, the Appellate Division of the Superior Court, in February 1949, reversed and set aside the judgment and directed a rehearing, stating that the proofs failed to support the judgment.

An Advisory Master was appointed and heard the case in March 1949. As a part of his consideration he heard the testimony of several psychiatrists who had examined Greg, and he himself examined Greg. He also examined the various members of the families here concerned and several letters which had been sent between the families. There is some evidence to show at the time Greg was examined by psychiatrists on March 17, 1949, he flew into a tantrum and was almost uncontrollable. After this examination Greg allegedly "disappeared and was not seen by any member of the Seitz family for months." The Advisory Master in his report attributed Greg's "antisocial tendencies" to the Seitz family, and particularly to Mrs. Seitz, Sr., a plaintiff herein, whom he described as "emotional, unstable and having antisocial tendencies and hatreds."

In accordance with these conclusions the Chancery Division of the Superior Court, in an order dated June 6, 1949, awarded custody of the three children to Isabelle S. Seitz, giving Arthur M. Seitz, Jr. the right of visitation. This was affirmed by the Appellate Division on December 21, 1949. 6 N. J. Super. 65.

While the appeal from the order of custody was pending Arthur M. Seitz, Jr. made application to the Superior Court of Somerset County, Chancery Division, to restrain Isabelle S. Seitz from removing the children from New

Jersey. Application was denied and he appealed to the Appellate Division, which court referred the matter back to the trial judge. During this period Arthur M. Seitz, Jr. also had filed a petition to award to him the custody of Greg, based upon new evidence. The Superior Court of Somerset County, Chancery Division, accordingly, on August 6, 1951, issued an order forbidding the removal of Greg from New Jersey.

On September 7, 1951, upon motion of Mr. Romond for Isabelle S. Seitz, all outstanding proceedings were consolidated.

On November 9, 1951, Isabelle S. Seitz removed her son Greg from the jurisdiction of New Jersey, taking him to Florida. From November 1951 until January 1952 there were several motions on behalf of Arthur M. Seitz, Jr. regarding this removal. At a hearing Mr. Romond stated that he did not know the whereabouts of his client. Finally, on January 4, 1952, the judge of the Superior Court, Chancery Division, Somerset County, disqualified himself, declining to act in these matters until instructed by the Supreme Court of New Jersey.

On January 5, 1952, Arthur M. Seitz, by authority of the order of June 6, 1949, went to visit his youngest child, Russell, who had been staying at the home of Mrs. Isabel C. Hayes, at Allenhurst, New Jersey. While he was there he came upon his son, Greg. He took Greg away with him, claiming that the mental and physical condition of the latter was such that he felt duty bound to take him to doctors and psychiatrists.

Having received information regarding the whereabouts of Greg and his father, who were at the home of Helen G. and Arthur M. Seitz, Sr., in Bernardsville, New Jersey, defendant Isabelle S. Seitz, through her attorneys, defendants Toolan and Romond, presented a petition to

the Superior Court, Chancery Division of Somerset County seeking an order to show cause in contempt. On January 15, 1952, an order issued directing the plaintiff Helen G. Seitz, her husband Arthur M. Seitz, Sr. and her son Arthur M. Seitz, Jr. to return the child to his mother or to show cause why they should not be held in contempt upon failure to do so. Personal service was attempted by the Under-Sheriff of Somerset County, but the Seitz home had been padlocked. He was told by its occupants that they refused to receive the service. On the return day, January 18th, the hearing was continued until January 22nd. On that date plaintiff Helen G. Seitz voluntarily appeared in court and testified that the child Greg was living in quarters of Arthur H. Seitz, Jr., that only a temporary passage separated this house from her own, and that she supplied food to the father and child. The court, on January 25th, issued warrants in contempt for the arrest of Helen G. Seitz, her husband, her son and Greg. On February 1st Helen G. Seitz was arrested, being released on bail a few hours later.

A contempt proceeding was also instituted on behalf of Arthur M. Seitz, Jr. against Isabelle S. Seitz for her violation of the order of August 6, 1951, which order had prohibited the removal of Greg from the state.

On February 20, 1953, the contempt proceedings were dismissed as to Arthur M. Seitz, Sr. and Helen G. Seitz. Arthur M. Seitz, Jr. has never returned Greg to the custody of Isabelle S. Seitz. Every inference points to the fact that he retains possession of Greg in the State of Florida.

In the custody proceedings resulting in the order of June 6, 1949, affirmed in 6 N. J. Super. 65, as aforementioned, Huyler E. Romond and John E. Toolan, counsel for Isabelle S. Seitz, had introduced into evidence a copy of

an anonymous letter, which purportedly had been mailed to and received by Helen G. Seitz. She subsequently filed a complaint against those lawyers before the New Jersey Supreme Court, claiming, among other things, that they had falsely accused her of being the author of the anonymous letter. This matter was referred to the Board of Bar Examiners. Hearings were held in September and October 1952, and a report was submitted to the New Jersey Supreme Court, which, by an order dated October 15, 1953, dismissed the complaint. In the Matter of John E. Toolan and Huyler E. Romond, New Jersey Supreme Court, October 15, 1953.

The original complaint in the instant proceedings was filed on December 31, 1953 by Helen G. Seitz and Arthur MacGregor Seitz, III (Greg), against John E. Toolan and Isabel C. Hayes (mother of Isabelle Seitz). That complaint was prepared by Helen G. Seitz without the aid of counsel.

In that original home-made complaint damages are sought in behalf of the infant plaintiff Greg. The relevant portions appear to include allegations of a conspiracy to obstruct justice, to obtain his custody by means of fraud and perjury, to defraud him "of his paternal grandfather's long established business"; to deprive him of the companionship of his younger sister and brother, and "to deprive him of his constitutional rights". Additional damages are sought by his paternal grandmother, plaintiff Helen G. Seitz. The portions relevant to her charges appear to include allegations of defamation of character, false arrest, malicious prosecution, and conspiracy to injure her "by criminal slander" and to obtain illegal possession of her three grandchildren for Isabelle S. Seitz.

An amended complaint, prepared by counsel and filed May 10, 1954, naming Helen G. Seitz as plaintiff, charges

malicious prosecution, false arrest, abuse of process, and conspiracy to accomplish all of these and to defame her. The defendants named are John E. Toolan, Isabel C. Hayes, Huyler E. Romond and Isabelle S. Seitz.

Subsequently, upon refusal of Helen G. Seitz to act as guardian ad litem in behalf of the infant plaintiff, Greg, William H. Tallyn, Clerk of this court, was appointed as guardian ad litem and the same attorney who represents Helen G. Seitz, Archibald Palmer, was assigned as his counsel. An amended complaint was filed on June 6, 1954, alleging conspiracy to injure the infant plaintiff mentally, physically and socially, to deprive him of the love, care and affection of his father and paternal grandparents, to illegally obtain his custody for Isabelle S. Seitz, to deprive him of his constitutional rights, and thereby to abuse the processes of the courts of New Jersey. Helen G. Seitz is named as a party plaintiff, but no harm to her is alleged in this amended complaint, nor is any relief sought in her behalf. The defendants named are the same as in the previous amendment. The amendments, taken together, replace and supersede the original complaint.

There is also a counterclaim brought by defendant John E. Toolan against Helen G. Seitz alleging that certain matters averred in the original home-made complaint were libelous.

Defendants have moved for summary judgment on the amended complaint and the counterclaim, basing their motions upon the pleadings and affidavits. Defendant Toolan also moves to strike the reply to the counterclaim.

Before disposing of the merits it is necessary to consider the argument advanced by the plaintiffs that the motion for summary judgment is premature since it is based upon affirmative defenses in a case in which defendants have failed to file an answer. For this proposition

plaintiffs cite the case of Hooven, Owens, Rentschler Co. v. Royal Indemnity Co., S. D. Ohio 1940, 1 F. R. D. 526. That case was peculiar on its facts since the basis of the motion for summary judgment was that plaintiffs had delayed in filing a complaint for a period of time exceeding a limitation established by contract with defendants. That defense was not founded upon a statutory period of limitations, but was based upon a contractual limitation which could be put before the court only through a responsive pleading. In deciding the case the court (at page 527) clearly stated that the course of action taken was not meant to establish a precedent but was designed rather to expedite the disposition of the particular case.

In Miller v. Hoffman, D. N. J. 1940, 1 F. R. D. 209, defendant moved for summary judgment on a counterclaim brought by a third-party defendant. The motion was filed prior to an answer and was based upon the affirmative defense of release. The court granted the motion and specifically ruled on the question of whether such a motion was premature, holding in the negative.

Rule 56(b) of Federal Rules of Civil Procedure is as follows:

> "(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, *at any time*, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." (Italics supplied.)

The clear language of Rule 56(b) is that a motion for summary judgment may be brought at any time. There is no requirement that such a motion, if based upon affirmative defenses, may be filed only after service of an answer. See 6 Moore's Fed. Practice 2049.

On Motion Addressed to Amended Complaint of Helen G. Seitz

The amended complaint of Helen G. Seitz focuses around her arrest on February 1, 1952 and the resultant allegations of false arrest and malicious prosecution. She advances the following chain of argument:

1. That she was not a party to the custody proceedings resulting in the order of June 6, 1949, and therefore could not be held in contempt as having violated that order.

2. That the criminal contempt charge was the result of an application therefor of defendant Isabelle S. Seitz presented by her attorneys, defendants John E. Toolan and Huyler E. Romond, who were compensated by defendant Isabel C. Hayes.

3. That personal service of the order to show cause of January 15, 1952, was never made on her.

4. That the warrant for her arrest for contempt issued without a hearing on its merits.

5. That the dismissal of the charges on February 20, 1953 was a successful termination of the proceedings from her standpoint.

6. That the defendants maliciously, knowingly, wilfully and without cause brought false charges against her.

The affidavit of defendant Huyler E. Romond, dated March 11, 1954, uncontroverted in the following respect, establishes that the contempt proceedings against Arthur M. Seitz, Sr. and Helen G. Seitz were dismissed as a result of an agreement negotiated Mr. and Mrs. Seitz, Sr., Walter R. Gotschalk, attorney for Mr. Seitz, Sr., Mr. Romond,

and Morris Spritzer, an attorney who had been appointed by the court to prosecute the contempt proceedings against Mr. and Mrs. Seitz, Sr. and Arthur M. Seitz, Jr. The reason for the dismissal was that Arthur M. Seitz, Jr. had taken Greg to Florida and obviously intended to keep him there, so that nothing was to be gained by the prosecution of the contempt proceedings against Mr. and Mrs. Seitz, Sr. As a part of this compromise the contempt charge pending against Isabelle S. Seitz was also to be dismissed. The affidavit of Mr. Spritzer, dated March 11, 1954, confirms these facts in every respect.

Three elements must be present to establish a cause of action in malicious prosecution—(a) successful termination of the prior prosecution in favor of present plaintiff; (b) absence of probable cause for the institution of the prior prosecution; and (c) malice as a motive for the institution of the prior prosecution. Prostick v. Vroom, 1942, 128 N. J. L. 383, affirmed 129 N. J. L. 465.

The authority is overwhelming that a "successful termination" must have an air of finality tantamount to a disposition on the merits. 54 C. J. S. 1019-1027. A dismissal which is brought about by a compromise is not such a termination. 54 C. J. S. 1026. Here the dismissal of the contempt proceedings against Helen G. Seitz was a part of a compromise agreement for mutual dismissals of contempt charges against adverse parties. This agreement was further prompted by the absence from the jurisdiction of the primary offender, Arthur M. Seitz, Jr. Compart Halberstadt v. N. Y. Life Insurance Co., 1909, 194 N. Y. 1, 21 L. R. A. NS 293, at page 297.

It is also to be observed that the Superior Court of New Jersey was a party to these contempt proceedings. Its warrants had gone out directing the respondents to appear. The respondents could not themselves individu-

ally or collectively dissolve the effectiveness of the court's command without its consent. In this instance the attorney appointed by the court to prosecute its order arranged its dissolution obviously by and with the court's consent. Accordingly the dismissal did not amount to a successful termination of the prior prosecution such as will support a cause of action in malicious prosecution.

Furthermore the voluntary testimony of Helen G. Seitz in the New Jersey Superior Court on January 22, 1952, admitting that Greg was at that time being quartered at the Seitz residence in Bernardsville and that she had been supplying food to Arthur M. Seitz, Jr. and Greg, was sufficient to establish that there was probable cause for the issuance of the contempt warrant against her since she was, by her own admission, aiding her son to violate the custody order of June 6, 1949. The facts, as they appeared, clearly warranted the belief that she was guilty of the contempt. Lane v. Penna. R. R., 1910, 78 N. J. L. 672. These facts stand uncontroverted, so that the issue of probable cause is a question of law and not one for determination by a jury. Shoemaker v. Shoemaker, 1951, 11 N. J. Super. 471, 475.

However, Helen G. Seitz argues that she was not a party to the custody order and therefore could not be held in contempt for its violation. She extends this argument to allege that the defendants, in instituting the contempt action against her, caused the court to exceed its jurisdiction and therefore are liable to her for false arrest and abuse of process. I know of no authority for the proposition that only one who is a party to a proceeding resulting in an order of a court can be guilty of contempt by violating the order. Admittedly Helen G. Seitz provided a home and food for her son knowingly in his abduction of Greg and was therefore a party to the frustration

of the intended effect of the custody order. Certainly there was probable cause to issue a warrant for contempt, upon the return of which there would be an opportunity to adjudicate the merits of the offense.

Helen G. Seitz also contends that she was not personally served with the order to show cause of January 15, 1952, and that the warrant for her arrest issued without a hearing on the merits of the contempt. It is difficult to see in what respect these allegations bear upon a civil action such as the instant one. However, since Helen G. Seitz alleges a conspiracy to injure her, by abuse of the process of the New Jersey courts and a denial of her constitutional rights arising out of the acts of the defendants, the merit of these contentions will now be considered.

Although Helen G. Seitz was not personally served with the order to show cause, the testimony of the Under-Sheriff in the Superior Court on the return day of the order established that service was thwarted by the Seitz family by means of the device of padlocking the gates around the premises. Furthermore, Helen G. Seitz voluntarily appeared in court on January 22 and did not enter a special appearance or contest the jurisdiction of the court. In so doing she waived any rights to assert that there was a lack of adequate service of process.

New Jersey Rule 2:8-2(a), then in effect,[1] reads as follows:

> "A criminal contempt, except as provided in Rule 2:8-1, shall be prosecuted on notice, and if it occurs in a cause it shall be prosecuted in the cause in which it occurs. The notice shall state the time and place of hearing, allowing a reasonable time

[1] Now Rule 3:8-2(a) under present Rules Governing the New Jersey Courts.

> for the preparation of the defense, and shall state the essential facts constituting the contempt charged. The notice may be given orally by the judge in open court in the presence of the person charged with contempt or by an order to show cause or *an order of arrest.*" (Italics supplied.)

This language clearly provides that notice of a contempt proceeding may be given by an order of arrest. A judgment of conviction of contempt was therefore not a condition precedent to the issuance of the warrant for the arrest of Helen G. Seitz. The warrant was issued following the hearing on the order to show cause, and the rule was observed.

Moreover, the affidavits indicate that the warrants were issued by the court contrary to the suggestion of the defendant Romond that the court proceed instead by habeas corpus to effect the release of Greg from the unlawful custody of his father and paternal grandparents. The court on its own initiative, according to the official transcript, decided that in a contempt proceeding of the sort before the court the most effective way to deal with the situation was by warrant for arrest. Accordingly, there can be no liability on the part of the defendants for causing the arrest itself, considering this feature separately from the allegations of malicious prosecution.

The third count of the amended complaint of Helen G. Seitz alleges that her arrest was an abuse of process for the following reasons:

(a) She was not a party to the custody proceedings resulting in the order of June 6, 1949.

(b) She was never served with the order to show cause, dated January 15, 1952.

(c) The sole purpose of her arrest, which was caused by defendants, was to force her son, Arthur M. Seitz, Jr. to bring Greg into court.

The first two of the foregoing propositions have been discussed earlier and the determinations apply here as well. The third will now be considered.

A cause of action for abuse of process arises out of the improper use of process after it has issued. It is the employment of a process in a matter not contemplated by law. Ash v. Cohn, 1937, 119 N. J. L. 54, 58. See also Restatement of Torts, § 136(b), comment (c). The test is whether the process has been used to accomplish some unlawful end.

It is clear that the arrest of Helen G. Seitz occurred in the regular course of the contempt proceedings against her for the part that she, by her own admissions before the court, had played in violating the custody order of the court. Furthermore, even if the ultimate purpose of the contempt and her arrest was to compel the return of Greg, this was certainly a lawful objective and amounted to a judicial attempt at the enforcement of the custody order. This is the recognized purpose of criminal contempt.

The averments in the fourth count of the amended complaint of Helen G. Seitz relating to a conspiracy to accomplish malicious prosecution, false arrest and abuse of process, encompass the same allegations as are made in the individual counts directed to those specific causes of action.

The area of law dealing with civil conspiracy is a nebulous one. However, in New Jersey the leading case of Van Horn v. Van Horn, 1890, 52 N. J. L. 284, affirmed in 56 N. J. L. 318, is still cited for the proposition that

> "Courts almost uniformly disregard the charge of conspiracy as an actionable element, and consider the malicious injury and resulting damage as the foundation and support of the action."

Louis Kamm, Inc. v. Flink, 1934, 113 N. J. L. 582; French v. U. S. Fidelity & Guaranty Co., D. N. J. 1950, 88 F. Supp. 714. In the case of Kamm v. Flink, supra, the court said:

> "The general rule is that a conspiracy cannot be made the subject of a civil action unless something is done which, without the conspiracy, would give a right of action." 113 N. J. L. at p. 592.

Accordingly, since it has been decided above that there is no basis here for causes of action in malicious prosecution, false arrest or abuse of process, the cause of action for conspiracy to accomplish those wrongs must likewise fail. See 15 C. J. S. 1027.

Included in the fourth count of the amended complaint of Helen G. Seitz is an allegation sounding in conspiracy to "defame" her. Specifically, she refers to the following acts, alleging them to be in furtherance of the conspiracy:

(a) At the custody litigation the defendants introduced a copy of an anonymous letter addressed to her, containing derogatory remarks about Isabelle S. Seitz and her parents. Defendants insinuated that she, herself, was the author of this letter, a copy of which she had forwarded to Isabel C. Hayes.

(b) At the custody proceedings defendants submitted affidavits which were false and which were designed to cast aspersions as to the character and sanity of Helen G. Seitz.

The publication of the alleged defamatory matter was no later than June 1949, while the first complaint in the

instant case was not filed until December 1953. Under the provisions of R. S. 2A:14-3,[2] the statute of limitations for a defamation is one year from the publication thereof. Therefore an action in defamation would be barred.

The question therefore is whether the theory of the Van Horn, Kamm and French cases, supra, applies equally to a charge of *conspiracy* to defame so as to render the latter equivalent to a cause of action in defamation, which would be barred by the Statute of Limitations. The Van Horn case established the doctrine in New Jersey that where conspiracy is charged in a tort action, the conspiracy will be disregarded and the tort itself will be considered. However, that opinion made particular exception for the situation where the complaint involved a conspiracy to deprive an individual of some economic benefit or gain. Moreover the court specifically considered the statute of limitations issue and held that the above cause of action was to be distinguished from slander and that the statute would not be applicable. The only inference to be drawn is that the period of limitation would apply to the instant complaint, a *conspiracy to defame*. It is therefore barred.

It follows therefore that the motion for summary judgment made by the defendants against the plaintiff Helen G. Seitz must be granted.

On Motion Addressed to Amended Complaint of William H. Tallyn, Guardian Ad Litem of Arthur M. Seitz, III

The first seven paragraphs of the amended complaint are introductory and serve to identify the parties. Para-

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[2] "Every action at law for libel or slander shall be commenced within 1 year after the publication of the alleged libel or slander." R. S. 2A:14-3.

graphs 8 through 35 generally set forth a factual background of domestic strife in the Seitz family circle, particularly outlining the history of the custody litigation. With a few possible exceptions, which are discussed immediately hereafter, these paragraphs plead matter which is evidentiary, and in some instances completely immaterial. Accordingly, they are improperly included in the complaint, in the light of provisions of Rule 8(a)(2) F. R. C. P.[3]

Paragraph 9 alleges that defendant Isabel C. Hayes induced defendant Isabelle S. Seitz to desert the infant plaintiff in December 1947. The case of Kleinow v. Ameika, 1952, 19 N. J. Super. 165 holds that a child has no cause of action against a third party to recover for alienation of his parent's affections. That is the law of New Jersey and this court is controlled by it. The case of Russick v. Hicks, D. Mich. 1949, 85 F. Supp. 281, cited by plaintiff, specifically involved an application of the law of Michigan and is not binding on this court. The case of Daily v. Parker, 7 Cir. 1945, 152 F. 2d 174, also cited by plaintiff, specifically holds (at page 177) that a Federal Court is bound by the declaration of the state courts on this question. State v. McFelly, 25 Misc. 303, cited by plaintiff, is a criminal case and has no application here.

Paragraph 18 alleges that "state psychiatrists" testified that one Dr. Flicker, a psychiatrist, engaged on behalf of the defendant Isabelle S. Seitz, subjected the infant plaintiff to a harrowing and brutal experience during an examination made by him in the custody proceedings. Dr. Flicker is not a defendant here, and no wrong doing on the part of any defendant or other person is alleged in this para-

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[3] "(a) CLAIMS FOR RELIEF. A pleading which sets forth a claim for relief, whether an original claim, * * * shall contain * * * (2) a short and plain statement of the claim showing that the pleader is entitled to relief, * * *" 8(a) F. R. C. P.

graph. There is only a hearsay statement that the "state psychiatrists" characterized Dr. Flicker's examination as harrowing and brutal.

Paragraph 19 alleges that the infant plaintiff had been deprived of any contact with his father between November 12, 1948 and June 10, 1949. This paragraph alleges no wrongdoing by any of the defendants herein or of anyone else, for that matter. It fails to state a cause of action.

Paragraph 28 alleges that on November 9, 1951 defendant Isabelle S. Seitz removed the infant plaintiff from the jurisdiction of New Jersey in order to prevent him "from testifying regarding her then culpability and from exposing those who had been responsible for his exhibition of fear and terror on the 17th day of March, 1949." In the light of Reingold v. Reingold, 1935, 115 N. J. L. 535, and decisions following it, it is extremely doubtful whether an infant has the right, in New Jersey, to sue his parent in tort. Although the cases all involve negligent torts, the Reingold case cites with approval the case of Hewlett v. George, 68 Miss. 703, which held that a child had no cause of action against his mother for false imprisonment, and also points out that the rule has been applied in cases of assault and battery, excessive punishment and ravishment. Additionally, this paragraph fails to state a claim. The complaint establishes that the infant plaintiff was returned to New Jersey no later than January 15, 1952, and no claim is made alleging any harm to him proximately resulting from his two month absence from the state. The contention that he was removed from the state in order to prevent disclosures of wrongdoing is considered to be frivolous, since during the period between June 1949 and November 1951 he was available for such purpose. At any time during that period he could have been questioned.

The crux of this amended complaint is apparently contained in paragraph 36, which alleges a conspiracy to

oppress and harm the infant plaintiff mentally, physically and socially; to interfere with his health and development; to destroy his love, respect and affection for his father; to illegally obtain possession of him for his mother to abuse the processes of the courts of New Jersey; and to interfere with the administration of justice in those courts with intent to deny the constitutional rights of the infant plaintiff. The remainder of the amended complaint relates to acts allegedly performed in furtherance of the conspiracy.

None of the cases cited by this plaintiff in his memorandum involves a cause of action in civil conspiracy. On the basis of the New Jersey doctrine established in the Van Horn, Kamm and French cases, supra, the conspiracy charge will be dissected to see whether there is a right of action for the wrongs alleged, in the absence of the conspiracy.

It becomes immediately obvious that, in the main, these allegations constitute nothing more than an attempted collateral attack on the judgment in the custody proceedings, which attack cannot survive a motion for summary judgment. A custody order must of necessity bind the child by its terms to the same extent that it does the contesting parents. Principles of res adjudicata and collateral estoppel must therefore apply to bar further litigation by the child as well as the parents who were named parties since the litigation is really in the interest of the welfare of the child and in effect he is privy to it. See Restatement of Judgments, § 83.

Moreover, the acts alleged to be in furtherance of the conspiracy do not in themselves constitute conduct which would endow the infant plaintiff with a cause of action. They relate directly to the custody proceedings or merely repeat averments found earlier in this amended complaint or in the amended complaint of Helen G. Seitz. Otherwise,

the only allegations of acts designed to injure the infant plaintiff which have not already been discussed relate to his being taught to believe in witches, his being told that his father and paternal grandparents were dead, his being told that he, as well as his mother and maternal grandmother, were beyond the law, and other such mystical and ephemeral contentions. Nowhere does there appear to be any causal relationship between these averments and any alleged harm to the infant plaintiff, cognizable in damages.

The amended complaint on behalf of Arthur M. Seitz, III fails to state a cause of action. The motion for summary judgment made by the defendants against this plaintiff must also be granted.

Motion for Summary Judgment on Counterclaim and Motion to Strike and Expunge Reply to Counterclaim

We now come to a consideration of the motion for summary judgment made by the defendant John E. Toolan on his counterclaim against the plaintiff Helen G. Seitz, as well as a motion by him to strike and expunge her reply to his said counterclaim.

The counterclaim of Mr. Toolan alleges that the original complaint of Mrs. Helen G. Seitz was libelous in that it falsely and maliciously charged that in 1922 defendant Toolan, as Assistant Prosecutor of Middlesex County, had been guilty of "atrocious prosecution" of a young boy with intent to deprive him of "life and/or liberty," had attempted to convict the boy with "spurious evidence," had endeavored to "railroad" him as the perpetrator of a murder, and had in other cases, used "faked court orders to accomplish the devastation of persons objectionable to him or dangerous to the accomplishment of his intentions."

The reply of Helen G. Seitz, filed after service of the motion for summary judgment by Mr. Toolan, sets up four affirmative defenses. They are as follows:

(a) The amended complaint supersedes the original and the latter for all purposes becomes non-existent.

(b) The counterclaim is premature and must await determination of the action brought by plaintiffs.

(c) Privilege.

(d) Truth.

The foregoing four affirmative defenses constitute the identical grounds upon which Helen G. Seitz resists the motion of Toolan for summary judgment on his counterclaim. The fact of the writing and the publication of the alleged defamatory words cannot be disputed here since they appeared in a document filed in this very court, a matter of public record. There is also no question but that the words, in the absence of a valid affirmative defense, constitute libel per se, since they charge malfeasance on the part of a public official. Kelly v. Hoffman, 1948, 137 N. J. L. 695.

There is no merit in the contention of the plaintiff that no claim can lie for defamation appearing in the original complaint due to the fact that the amended complaint supersedes the original in its entirety. The cases cited for that proposition [4] have no relevance here, since they hold merely that a complaint, once superseded by amendment, is no longer part of the pleadings of the particular case. The fact remains that the words were written and published, and if they are defamatory, they give rise to a cause of

[4] United States v. Shefner Iron & Steel, 71 F. Supp. 161; Studio Carpenters Local v. Loew's Inc., 182 F. 2d 168.

action. Even an affirmative retraction would operate only to limit the measure of damages. See Lindsey v. Evening Journal Assn., 1933, 10 N. J. Misc. 1275. Here the act of filing a complaint which does not include the allegedly defamatory words as an amendment to the one containing them cannot obliterate them.

Plaintiff also argues that an action for damages for libel based upon alleged defamation in pleadings may not be maintained until termination of the judicial proceedings involving those pleadings, and that the counterclaim is therefore premature. Three cases are cited. Neth v. Taylor, D. Pa. 1941, 37 F. Supp. 24 does not discuss this issue at all, but deals with the question of privilege as a defense to libel, where the statements in a pleading are pertinent and relevant to the issue. United States v. New Orleans Chapter, 5 Cir. 1942, 127 F. 2d 649, and Mennen Co. v. Krauss Co., D. La. 1941, 37 F. Supp. 161, each dismissed counterclaims for libel in the pleadings, holding that they could not accrue until after the termination of the proceedings based upon those pleadings. However, the court in each of those cases applied the state law of Louisiana. I cannot concur in this application of state law. The question here does not involve the merits of the libel, but only the propriety of raising the issue as a counterclaim instead of a separate action. 3 Moore's Fed. Practice, § 13.18 (at page 50) states:

> "Whether a defendant has a right that can afford the basis of a counterclaim is, of course, a substantive matter; whether he must bring it as an individual action or may plead it as a counterclaim can be properly classed as procedural."

Accordingly, I am of the opinion that federal law should be applied to resolve this issue, which is procedural.

Unlike the circumstances in the cases of United States v. New Orleans Chapter and Mennen Co. v. Krauss Co., supra, the issue of truth or falsity does not turn upon the result of the case in chief. In this case the matter which is alleged to be defamatory is only incidental to the complaint and does not constitute any of the claims upon which plaintiffs seek relief. Therefore no purpose is to be served by withholding the libel action until a resolution of the issues of plaintiff's law suit. Rule 13(b) F. R. C. P. clearly state that *any* claim against an opposing party may be stated as a permissive counterclaim. The counterclaim is not prematurely brought.

It is the further contention of plaintiff that the words were privileged and that there exists an absolute immunity to a defamation action. On this question there is no direct authority in New Jersey. On the other hand, La Porta v. Leonard, 1916, 88 N. J. L. 663, stands for the rule that words spoken by counsel [5] are privileged, provided they are relevant and pertinent to the subject matter of the controversy. Furthermore, there is overwhelming authority in other jurisdictions holding that matter contained in the pleadings is privileged as long as it pertains to the case before the court. Ginsburg v. Black, 7 Cir. 1951, 192 F. 2d 823; Amer. Agric. Chem. Co. v. Barnes Co., D. S. C. 1939, 28 F. Supp. 73. The statements need not be relevant in the strict sense (Brown v. Shimabukuro, D. C. Cir. 1941, 118 F. 2d 17) and doubts are resolved in favor of the pleader. Sacks v. Stecker, 2 Cir. 1932, 60 F. 2d 73. The issue of pertinence is a question of law for the court, for the matter to which the privilege does not extend must be so palpably

[5] Mrs. Seitz drafted the original complaint herself as attorney pro se and claims the privilege both as an attorney and as a party-litigant.

wanting in relation to the subject matter of the controversy that no reasonable man could doubt its irrelevancy. Young v. Young, D. C. Cir. 1927, 18 F. 2d 807.

The question to be decided, then, is whether or not the words relate sufficiently to the subject matter of this litigation to come within the scope of the privilege. Under the liberal construction rule of the above mentioned cases the question might be answered in the affirmative. However, all of those cases dealt with well-pleaded facts. Here the facts alleged by the disputed words have no bearing on the causes of action in the complaint except as proof of them may or may not be received in evidence to show a state of mind or course of conduct. Accordingly, they have no proper place in the complaint of Mrs. Seitz. The evidence relative to these words may or may not be somewhat relevant to the plaintiff's case, but that question is appropriately to be determined at the trial. It would be highly extraordinary and unfair procedure to allow a plaintiff to aver any defamatory words in a complaint under a protective privilege upon a theory that this evidence would have some bearing upon the proof of the cause of action. The privilege should therefore be limited to well-pleaded allegations. It has no application as a defense to this counterclaim.

Finally, plaintiff in her reply to the counterclaim, and in her defense to the motion for summary judgment contends that the words in question are true, and therefore not defamatory. Defendant Toolan, in his counterclaim denies the truth of these words by affidavit, but an issue of fact is plainly raised between the affidavit and the responsive pleading of Helen G. Seitz of the defense of truth. Affidavits may be used only to determine whether an issue of fact is presented; they may not be used to decide the fact issue. An affidavit cannot be treated as proof contradictory

to well-pleaded facts. Frederick Hart & Co. v. Recordgraph Corp., 3 Cir. 1948, 169 F. 2d 580. In this light defendant Toolan's motion for summary judgment on the counterclaim must therefore be denied.

This discussion logically leads to a disposition of the final matter now before this court, namely, the motion of defendant Toolan to strike and expunge the reply of Helen G. Seitz to the counterclaim. He grounds the motion on the reason that the reply is filed prematurely and must await decision on his motion for summary judgment on the counterclaim, the authority for which is under Rule 56(a) F. R. C. P., which provides that

> "A party seeking to recover upon a * * * counterclaim, * * * may, at any time after the expiration of 20 days from the commencement of the action * * *, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof."

The motion for summary judgment was filed two days after the counterclaim. Under Rule 12(a) F. R. C. P. the plaintiff was required to serve her reply to the counterclaim within 20 days. She filed it within a few days after service upon her of the counterclaim. There would appear to be no reason why she should be precluded from filing her defense to the counterclaim within the time prescribed by Rule 12(a) merely because the defendant had made a motion for summary judgment on his own counterclaim. Indeed, if the plaintiff had required additional time to file her reply by reason of the motion for summary judgment, the practice is to apply for an order extending time.

But in this case the attack upon the reply to the counterclaim is especially weak for the reply sets up identical

defenses to the counterclaim as plaintiff makes to defendant Toolan's motion for summary judgment on his counterclaim. Therefore the disposition of the said motion for summary judgment rules the motion to strike the reply. It will be denied for the same reasons except that the first (prematurity of counterclaim), second (the amended complaint renders the original complaint non-existent), and fourth (privilege) separate affirmative defenses in the reply to the counterclaim will be stricken. In all other respects the reply will stand.

To summarize: (1) The motion of the defendant for summary judgment on the amended complaint of Helen G. Seitz will be granted. (2) The defendants' motion for summary judgment on the amended complaint of William H. Tallyn, Guardian Ad Litem of Arthur M. Seitz, III, will be granted. (3) The motion of defendant John E. Toolan for summary judgment on his counterclaim will be denied. (4) The motion of John E. Toolan to strike the reply of Helen G. Seitz to his counterclaim will be denied in part and granted in part.

An order shall be settled in conformity with the foregoing conclusions.

Opinion of the Court of Appeals

PER CURIAM.

Originally this suit was instituted by appellant Helen G. Seitz individually and on behalf of the infant appellant Arthur MacGregor Seitz, III. Thereafter amended complaints were filed by her and on behalf of Arthur MacGregor Seitz, III, by his guardian ad litem, William H. Tallyn. The Helen G. Seitz amended complaint charged the defendants with malicious prosecution, false arrest and imprisonment, abuse of process and conspiracy to commit these offenses and to defame her. The amended complaint for the infant alleged a conspiracy by the defendants to injure and ruin him mentally, physically and socially, to destroy his affection and respect for his father, to illegally obtain his custody for defendant Isabelle S. Seitz by abusing the processes of the courts of New Jersey and to interfere with the administration of justice in those courts with the intent to defeat and deny his constitutional and legal rights.

Chief Judge Forman in an exhaustive opinion, filed March 14, 1955, sustained the defense motions for summary judgment. At the same time motions on behalf of the defendant Toolan for summary judgment on his counterclaim against plaintiff Helen G. Seitz, and to strike her reply to the counterclaim were denied. Plaintiff's appeal from the judgment against them is in accordance with the certification by the District Court, under Rule 54-b of the Federal Rules of Civil Procedure, that there is no just reason for delay.

All questions here presented by appellants were raised in the District Court and were there carefully considered and correctly decided. The opinion of the District Court allowing summary judgment against the plaintiffs is clearly right.

The order of the District Court filed April 4, 1955 as amended by the order filed September 7, 1955 will be affirmed.

FILED
JUN 12 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM—1955

No. [redacted] 119

HELEN G. SEITZ and ARTHUR MacGREGOR SEITZ, III, an infant, etc.,

Petitioners,

vs.

JOHN E. TOOLAN, ISABEL HAYES, *et al.*,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM—1955

No. 982

HELEN G. SEITZ and ARTHUR MACGREGOR SEITZ, III, an infant, etc.,

Petitioners,

vs.

JOHN E. TOOLAN, ISABEL HAYES, *et al.*,

Respondents.

Respondents' Answer to Petitioner's Reasons for Allowance of Writ

At page 11 of the petition the petitioners advance two reasons for the allowance of the writ they seek. One is that the motion for summary judgment disregarded Rule 8(*e*) of the Federal Rules of Civil Procedure and the other is that the courts below (the District Court and the United States Court of Appeals for the Third Circuit) departed from the decisions of other federal courts holding that where there are issues of fact they may not be determined by way of summary judgment. With the first of these grounds we deal later in this brief under Point I. The second ground is disposed of by setting forth the facts which were before the lower courts, all of which facts demonstrated that there was not present before those courts any genuine issue as to any *material* fact, and that on the

material before the lower courts the defendants were clearly entitled to a judgment as a matter of law.

Before proceeding with our argument in support of the foregoing positions, we respectfully assert that the instant application is not one within Rule 19 of the Rules of the Supreme Court. Here there is not present the decision by any state court of any federal question, nor is there present the decision of any court of appeals in conflict with the decision of any other court of appeals in respect of the same matter or question. It may further be added that nothing has been exhibited in the petition for certiorari which indicates that there are present any "special and important reasons" why the judgment of the District Court and the unanimous affirmance by the Court of Appeals (231 F. 2d 224) call for the exercise of the Supreme Court's discretionary power of supervision.

We respectfully submit that for the reasons lastly stated the writ applied for should be denied. None the less we deem it appropriate that the reasons supporting the summary judgment approved by the two lower courts should be stated.

We are fully sensible of the rule anent the granting of a summary judgment, that such judgment must rest on *material* facts uncontroverted or admitted. Equally potent is the rule that such judgment may not be had if *material* facts are controverted by conflicting affidavits. We shall therefore dissect the proofs and indicate first the uncontroverted material facts upon which the lower court was moved to enter summary judgment and then the controverted facts which were legally without materiality or influence on the right to such summary judgment.

(All references to the record are to the appendices sent up from the Court of Appeals)

Facts

Uncontroverted Facts

The plaintiff Helen G. Seitz is the mother of Arthur M. Seitz, Jr. (not a party herein), and is the grandmother of Arthur MacGregor Seitz, III, the infant plaintiff. That infant is one of three children born of the marriage of the said Arthur M. Seitz, Jr. and Isabelle S. Seitz, a defendant herein. Said Isabelle S. Seitz is the daughter of the defendant Isabel C. Hayes. John E. Toolan is the senior member of the law firm of Toolan, Haney & Romond and has practiced at the bar of New Jersey for about forty years. In the contest between the young Mr. Seitz and his wife, the defendant Isabelle S. Seitz, over the custody of their children, the wife was represented by the defendant Toolan. Subsequently, in certain contempt proceedings hereinafter mentioned, she was represented by Toolan's partner, the defendant Romond. The husband of the plaintiff Helen G. Seitz is Arthur M. Seitz, Sr. He is not a party to the within cause but will of necessity be mentioned in connection with the contempt proceedings out of which have sprung the alleged torts of false arrest, malicious prosecution and abuse of process, for which the plaintiffs sought recovery in the court below. Because of substantial identity of names, we shall in this brief refer to the plaintiff Helen G. Seitz as the elder Mrs. Seitz; to the defendant Isabelle S. Seitz as the younger Mrs. Seitz or the daughter-in-law; and to the two Seitz males (not parties herein) as Mr. Seitz, Sr. and Mr. Seitz, Jr.

The younger Mrs. Seitz was the daughter of the late Joseph E. Stricker, one-time Prosecutor of Middlesex County. She and Mr. Seitz, Jr. were married on March 14, 1942. Three children were born to them: Arthur

MacGregor Seitz, III (the infant plaintiff, who in the affidavits is referred to as "Greg" and will be so called herein), a second boy named Russell, and a girl named Pauline. The order of custody entered in the former Court of Chancery of New Jersey on March 9, 1948, gives the then ages of the three children as follows: Greg 5 years 4 months; Pauline 1 year 9 months; Russell 7 months.

Domestic disputes arose between the young married couple and litigation ensued. In December, 1947, the husband brought action against the wife in the former Court of Chancery of New Jersey, seeking as part of his relief the custody of the three children. The wife's answer denied the allegations of the petition and prayed that she be given the custody of the children (10a). The cause was heard by Judge McLean, who on December 17, 1948, entered final judgment dismissing the husband's petition for divorce and awarding to the wife the permanent custody and control of the three infant children. That judgment awarded alimony for the support and maintenance of the wife and children and further "restrained the husband from visiting, telephoning or otherwise communicating with or interfering with said children, until the further order of the Court" (11a). This judgment was reversed by the Appellate Division of the Superior Court of New Jersey on the ground that "the proofs failed to support the judgment" (12a). The direction of the appellate tribunal was that the cause be re-heard on the proofs theretofore taken plus such new evidence as would be received. The cause was then re-heard by Judge William J. Burton, whose opinion appears at 27a and whose final judgment appears at 37a. In that opinion Judge Burton (then an Advisory Master and shortly thereafter made a Judge of the Superior Court of New Jersey) said (34a):

> "It cannot be overlooked that the custody which is sought by the father in this case is in truth and effect

> the custody of the grandmother, Mrs. Seitz, Sr. It is admitted that the father has no position, and is without funds, his maintenance and that of his children will rest on the generosity of the paternal grandparents. There is in the home of the paternal grandparents a spirit of antagonism to the defendant. The plaintiff even boasts that he never loved his wife. The custody of the child in that home would not only be operative to deny the mother and the child alike of the benefits of even temporary enjoyments of mutual intercourse, but would clearly alienate the affection of the child from his mother."

He further said (36a):

> "Under normal circumstances, father should have the unrestricted right of visitation and reasonable access with his children, but this is an extreme and abnormal case. The welfare of the child, should after all, be first considered, and I am convinced that such visitation would do the child or children no good and would further affect Greg if precautions were not taken to prevent an association with the paternal grandmother. Most potent reasons presently exist which convince me this precaution must be taken."

The final judgment of the Superior Court was entered on June 6, 1949 (37a). It awarded the sole custody and control of the three children to the mother and permitted the husband to visit the children every other Sunday. He was, however, restrained from otherwise visiting, telephoning to or otherwise communicating with or interfering with the children. The judgment awarded the wife alimony and counsel fees. That judgment was unanimously affirmed by the Appellate Division of the New Jersey Superior Court on December 21, 1949 (12a) and its opinion is reported in

6 N. J. Super. 65. *That final judgment, so affirmed, is in full force and effect, never having been altered, modified or vacated.* There have been no custody proceedings since that affirmance. The only other proceeding in any way related to custody was a contempt proceeding brought by the mother against her husband and his parents because of the kidnapping in January, 1952 (more than two years after the affirmance of the final judgment of custody) of the infant son Greg.

The young mother and her three children continued to live with the maternal grandmother, the defendant Isabel C. Hayes, at the latter's home in Allenhurst, New Jersey. The husband, Arthur M. Seitz, Jr., resided with his parents at Bernardsville, New Jersey. On January 5, 1952, Greg then 9 years old, was playing in front of the Allenhurst home. An automobile pulled up in which were Seitz, Jr. and his father. The boy was taken into the car and whisked away. The mother, missing the boy, immediately notified the police. The frantic mother also telegraphed the plaintiff Mrs. Seitz, asking for the whereabouts of Greg. The following night she received a telegram from the younger Mr. Seitz stating that Greg was under the care of a psychiatrist, that Seitz, Jr. was awaiting a decision from the Supreme Court, and that he would advise further developments. The following day the young mother made four telephone calls to the Bernardsville home but no one answered the telephone. The evening of the following day, January 8th, the plaintiff Mrs. Seitz answered her daughter-in-law's telephone call and when asked where Greg was she replied that Greg was with his father "*at an unknown address*" (70a). The following day, January 9th, the young mother telegraphed to Mrs. Seitz, Sr., asking her to return Greg or, alternatively, to state when she could see him. There was no answer to this request, but the following day the young mother received a birthday card from Greg. Thereafter she made many telephone calls to the Bernards-

ville home but was "constantly refused the right to speak with Greg on the telephone" (71a). On January 13th Mrs. Seitz, Jr. telephoned her mother-in-law, mentioning the latter's refusal to let her talk to Greg or to reveal the whereabouts of his school or to let the mother see the boy, and again pleading that he be returned to the mother's custody (71a). On the day of the kidnapping the defendant Mrs. Seitz, Jr. communicated with Mr. Toolan and informed him of the fact that her boy Greg had been whisked away that afternoon in an automobile from the sidewalk in front of the Allenhurst home and that in that automobile had been her husband and his father. She conferred with Mr. Toolan the following Monday morning and he immediately sent to Mr. Gottschalk, the attorney for the husband (and later, in the contempt proceedings, the attorney for Mr. Seitz, Sr.) the telegram appearing at 22a, asking to be informed "where he (Greg) is being kept." The same afternoon Mr. Gottschalk replied by telegram that Seitz, Jr. had custody of the boy "at Bernardsville home." The telegram further said that he, Mr. Gottschalk, had advised Mr. Seitz, Jr. "to purge himself of contempt" and to deliver the child to Mr. Toolan's client and that Mr. Seitz, Jr. had stated that his doctor advised him "otherwise," and that he (Mr. Seitz, Jr.) "cannot accept my advice" (22a). Thereupon Mr. Toolan turned the matter over to Mr. Romond, with instructions to lay the matter before Judge McLean. From that moment Mr. Toolan had no further connection with the matter, it being handled thereafter entirely by Mr. Romond (22a).

Mr. Romond prepared the petition (69a) addressed to the Superior Court of New Jersey, Chancery Division. That petition set forth fully the facts lastly narrated concerning the spiriting away of the boy and the frantic and unavailing efforts of the mother to regain his custody or, at least, to talk to the boy. In paragraph 11 of that petition,

verified by the petitioner, Mrs. Seitz, Jr., she states that her son Greg is in the custody of his father at the latter's home in Bernardsville, New Jersey, in violation of the court's order of June 6, 1949; that Mr. Seitz, Jr. resides with his father (Mr. Seitz, Sr.) and with his mother (Helen G. Seitz). She further stated: "*I verily believe* tthat the said Arthur M. Seitz and Helen G. Seitz conspired with the plaintiff (Arthur Seitz, Jr.) to violate said order and *are aiding and abetting the plaintiff in continuing to violate said order.*" She concluded her petition by saying that she respectfully "*suggests* to the court that tthe said plaintiff, Arthur M. Seitz, Jr. (her husband), Artthur M. Seitz (her father-in-law), and Helen G. Seitz (her mother-in-law), by reason of the premises, are guilty of criminal contempt of this Court *and should be dealt with by the Court accordingly*" (71a-72a).

When Mr. Romond prepared this petition, the husband, Mr. Seitz, Jr., had no home of his own but was living with his parents on their large estate in Bernardsville (59a). Mr. Romond presented that petition to Judge McLean, he being that member of the Superior Court who held the vicinage in which the Seitzes resided (59a). Upon the presentation of the petition on January 15, 1952, Judge McLean signed an order to show cause, returnable January 18, 1952, at the State House Annex, Trenton, New Jersey, where Judge McLean regularly sat. That order directed Arthur Seitz, Jr. and both his parents to return the child forthwith to the home of the mother, Mrs. Seitz, Jr., at Allenhurst, New Jersey, or, alternatively, show cause why they should not be held in criminal contempt for their failure so to do. That order is shown as Exhibit IB at 72a. On the return day, January 18, 1952, Mr. Romond appeared before Judge McLean, as did the attorney Gottschaalk. The latter told the court that he represented Arthur Seitz, Jr. but not his parents. The court asked what efforts had been made to serve the order to show cause, whereupon testi-

mony was taken in open court. Mr. Gottschalk was sworn as a witness and the two said telegrams (one from Mr. Toolan to him and his reply thereto) were received in evidence. Gottschalk told the court that he had been served with a copy of the order to show cause but refused to disclose whether he had communicated with his client. He claimed privilege. He did, however, say that he had discussed the matter of the order to show cause both with Mr. Seitz, Sr. and Mrs. Seitz, Sr., and that Mrs. Seitz, Sr. had asked him whether or not an order of contempt required personal services and that he had told Mrs. Seitz that such personal service was required (59a, *et seq.*). Mr. Dungan Lamont, the Undersheriff of Somerset County (that being the county in which Bernardsville is situate), then took the stand and testified that he had received the papers on January 15, 1952, and went that evening to the Seitz home at Bernardsville, where he "found the gates were all padlocked and that he could not get into the premises." The following morning he again attempted to make service and found that the gates were still padlocked. He then entered on the land through a back way and rang the door bell, that Mrs. Seitz from a second-story window shouted, "What do you want," and that upon Lamont informing her that he had papers to serve, she hollered back at him, "If they are papers on contempt, we don't want them. On advice of counsel we won't take them. It has to be personal service." On that same occasion Mr. Lamont saw Mr. Seitz, Sr. and told him of the nature and substance of the papers which he, the Undersheriff, wanted to serve (60a).

Upon the conclusions of the foregoing proofs, Judge McLean made the observation which is cited verbatim at 60a, which in substance was a finding that the matters proved before him established a criminal contempt and that the cited parties had violated an order of the court and that such violation was calculated to retard the ad-

ministration of justice. The court made the further observation that the defiance of the court's order "just puts the court in a very ridiculous position and I don't propose that sort of conduct to continue" (61a). He then ruled that he was going to continue the hearing on the order to show cause until the following Tuesday (January 22) to give the defendants an opportunity to come in and submit themselves to the jurisdiction of the court. He added: "The longer the contempt continues the more severe the penalty must be," and then said that he was going to issue a writ of *habeas corpus*, directing the production of the child in court the following Tuesday (that would be January 22nd). He concluded his rulings with the following direction (61a):

> "That writ of habeas corpus will be placed in the hands of the State Police for service. Counsel will prepare the writ and fix it so it can be put into operation today and that will be the present order."

Upon Judge McLean making said direction, Mr. Romond stated that he would prepare the writ of *habeas corpus* and submit the same to the court. Then turning to Mr. Gottschalk, in open court, Mr. Romond said that, subject to the court's consent, the "State Trooper's business" (meaning putting the writ of *habeas corpus* in the hands of the State Troopers, as the court directed) could be avoided if counsel would agree to produce the boy the following Tuesday. Mr. Gottschalk said that he would do his best (62a). Thereupon Mr. Romond asked the court whether it wouldn't postpone the matter of a writ of *habeas corpus* until Monday, so that opposing counsel would have a chance to see if his client (Arthur Seitz, Jr.) would appear on Tuesday voluntarily. Mr. Romond added: "We can worry about the grandmother and grandfather later." In response to this request to the Court, Judge McLean said

that he would continue the whole matter until Tuesday, indicating that if the parties did not appear on Tuesday, the writ of *habeas corpus* would issue (62a). Mr. Gottschalk then stated to the court that he had advised his client to return the child and that no doctor could properly advise the father not to return the child (62a). Mr. Romond then restated the understanding that opposing counsel would use his good offices to get his client into court the following Tuesday "without the necessity of a writ of *habeas corpus.*" Mr. Seitz' counsel then asked the court whether if the child returned by Tuesday "we could get together without any further—," to which the court replied that that would mitigate the offense somewhat (63a).

The matter was then continued until the following Tuesday, January 22nd. On that day there appeared before Judge McLean, at Trenton, Mr. Romond, Mr. Gottschalk *and Mrs. Seitz, Sr.* Mr. Romond addressed the court and stated that he had drawn the order for a writ of *habeas corpus* in accordance with the court's direction and was presenting it "for whatever action the Court deems advisable in the matter to see that the order of this Court is respected and lived up to" (63a). Judge McLean then stated that he had changed his intention of issuing a writ of *habeas corpus* and that instead he was minded to issue a warrant for arrest and that such action would lead to a trial for which the court would have to designate counsel to represent the State. He concluded with the following direction (64a):

> "So I will direct that a warrant be issued for Greg Seitz, the child, his father, grandfather and grandmother in a contempt proceeding, and the warrant will provide that pending the final determination the child will be returned to his mother."

Mrs. Seitz was permitted to address the court and said the following:

"The child is not in my possession, has not been in my possession, he is living in quarters of his father's. The doors are locked. *There is only a temporary passage between our house and his.* He is taking care of the child. *I have supplied the food, if that can be called an offense.*" (64a)

Mrs. Seitz, Sr. was then asked by the court whether she had anything to say about the issuance of a warrant for the arrest of herself and her husband. Amongst other things she told Judge McLean: "You wouldn't have taken out a warrant except that they have asked you to." She then informed the court that Mr. Gottschalk did not represent her and that she was her own attorney. Judge McLean wanted to set the contempt hearing down for Friday of that week but Mr. Romond suggested that the respondents should have more time to prepare their defense, to which the court replied that if the warrant would be effective, then the hearing could be put down for a date to be fixed. Mr. Gottschalk then argued that the proceeding was a criminal contempt and that his *clients* were entitled to a trial by jury. The court replied that this statement would be entered and would be considered at the appropriate time.

The foregoing statements and excerpts of the proceedings before Judge McLean were taken from the official court transcript (65a).

In accordance with the directions given, as aforesaid, by Judge McLean, Mr. Romond presented to him the following day the order for the issuance of warrants for arrest. *Mr. Romond suggested to Judge McLean that perhaps for the present it might be better to proceed by a writ of habeas corpus than by an arrest.* Judge McLean said that he had already expressed his preference for the arrest as a process of bringing the accused persons before the court, that it was more than a matter of private con-

cern, that the Seitzes had flouted a final judgment of the Superior Court and had thereby offended against the dignity and authority of the court itself, that it was a criminal contempt which concerned the State, that he intended to use the most drastic remedy available under the rules of court, and that he considered an arrest the only effective way of dealing with the situation (65a). Judge McLean thereupon proceeded to sign the order for the warrants, dated and entered January 23, 1952 (73a). It was forthwith filed with the Clerk of the court. The latter forthwith caused to be issued the warrants so as aforesaid ordered to be issued. The warrant for the arrest of the plaintiff Helen G. Seitz was issued on January 23, 1952. It was tested in the name of Sidney Goldman, Judge of the Superior Court of New Jersey, Trenton vicinage. It is the practice in that court for writs issuing at Trenton to be tested in the name of the Judge of that court permanently holding the vicinage which includes Trenton. A true copy of that warrant and of the return thereof are shown at 75a to 76a. The plaintiff Mrs. Seitz charged in her initial complaint in the within action (at p. 55) that she was arrested under a "faked" court order. The court which entered the order for the issuance of the warrant was fully possessed of jurisdiction to do so. The methods available to the court by the rules thereof (which rules have the force of law) include "an order of arrest" (Rule 4:87-2 (a)). Mrs. Seitz, Sr., was arrested in the State House Annex on February 1, 1952, by William Beegle, a member of the State Police of the State of New Jersey. He brought her immediately before Judge McLean at the State House Annex, in Trenton, who fixed her bail at $1,000. She furnished that bail a few hours later and was thereupon forthwith released from custody (65a-66a).

The court of its own motion appointed Mr. Morris Spritzer Prosecutor to prosecute the contempt proceedings against Mr. and Mrs. Seitz, Sr. and their son (77a). That

Prosecutor gave Mr. and Mrs. Seitz, Sr. notice that the contempt matter would be moved on January 23, 1953. Previously thereto the Prosecutor had been in communication both with Mr. Romond and Mr. Gottschalk, trying to work out some arrangement under which the missing boy would be returned (from Florida, to which place he had been taken by his father) to the custody of his mother and the boy's father would be granted acceptable rights of visitation. When these efforts failed, the Prosecutor served his notices of trial. Mr. Gottschalk had informed the Prosecutor that he had endeavored to persuade the boy's father to return the child to New Jersey and that it looked as though the father would never agree to that. At this time there was also pending a much earlier contempt proceeding brought by Mr. Seitz, Jr. against his wife for having, without the court's consent, taken the children to Florida for a vacation. Mr. Gottschalk suggested to the Prosecutor that the most practical solution would be if *all* contempt proceedings could be dismissed. The Prosecutor communicated this suggestion to Mr. Romond and advanced his own view that he didn't think the father could be extradited for the kidnapping, but even if he could be extradited, that would not bring the boy back. Mr. Romond conferred on this matter with his client, and a day or two later advised the Prosecutor that Mrs. Seitz, Jr. was agreeable to the proposal that all contempt matters be dismissed, except that pending against her husband, it being believed that if the proceeding were kept open against the kidnapping father, it might some day have the effect of the boy being returned to the New Jersey jurisdiction. The Prosecutor communicated to Mr. Gottschalk the position taken by the young mother and her counsel, and the understanding between the Prosecutor and the two opposing counsel was "that the proposal should be laid before the court" (80a). That was done at Trenton on January 23, 1953, in open court. *Mr. Romond did not attend, but*

present were Mr. Gottschalk, the Prosecutor, and Mrs. Seitz, Sr. The Prosecutor reported to the court "that *the parties desired that both contempt proceedings be discharged, except as against Arthur M. Seitz, Jr.*" (81a). The Prosecutor urged the court to approve of that disposition and to enter an order accordingly. Judge McLean hesitated to agree, saying that the contempt had been an offense against the court itself, but that he would think about it and would reserve for the time being the signing of any order. Throughout this entire session Mrs. Seitz, Sr. did not personally address the court or seek to be heard. However, Mr. Gottschalk claimed that since the Prosecutor's appointment did not relate to the earlier contempt against the young mother, there should be separate orders, one in favor of Mrs. Seitz, Jr. and the other in favor of Mr. and Mrs. Seitz, Sr. *Gottschalk offered to draw both orders* (81a). Judge McLean had the matter under consideration for four weeks, and on February 20, 1953, and on motion of the Prosecutor, he dismissed the order to show cause and the charges of contempt against Mr. and Mrs. Seitz, Sr., and at the same time discharged their bail (78a). However, while Judge McLean was considering the proposal laid before him on January 23, 1953, in the presence of Mrs. Seitz, Sr., she wrote him a letter on February 6, 1953 (81a) in which she asked him to be "so gracious and judgely as to sign the orders dismissing the charges against my husband and myself" and that he order the refunding of the bail, "thereby discharging us from custody." (See the affidavit of the Prosecutor, 81a.) (It should be here noted that neither Mr. nor Mrs. Seitz, Sr. was then in custody, each having been held only for a few hours until bail was furnished.)

After the court had appointed Mr. Spritzer as Prosecutor in the contempt proceeding, the elder Mrs. Seitz harangued him with letters and dozens of telephone calls. At no time during the session before Judge McLean on Janu-

ary 23, 1953 (when she was present and heard the proposal of mutual dismissals of contempt) and at no time thereafter did Mrs. Seitz in any way indicate to the Prosecutor, Mr. Spritzer, that the proposal of dismissal made before Judge McLean in her presence was not by her wish or assent. (See paragraph 4 of Prosecutor's affidavit, 83a.)

The kidnapped boy has never been returned to this State. He is in Florida with his father, where live also Mr. and Mrs. Seitz, Sr. The two younger children are living with their mother in the Allenhurst home of the maternal grandmother, the defendant Mrs. Hayes. That grandmother alone supports the three of them. Their fugitive father contributes nothing to their support, this despite the order of the Superior Court of New Jersey. The grandmother Mrs. Hayes supported all three children until Greg was kidnapped on January 5, 1952, and has supported the other two children ever since and is ready to assume the complete support of the kidnapped boy if and when he will be returned from Florida and restored to the custody of his mother (paragraph 6 at 27b).

One further uncontroverted fact (a fact which the plaintiff Mrs. Seitz relied upon as some proof of a conspiracy) is that the defendant Mrs. Hayes retained Mr. Toolan to represent her daughter (the defendant Mrs. Seitz, Jr.) in the custody proceedings and that she, Mrs. Hayes, paid Mr. Toolan or his firm for those services.

Controverted Facts

In narrating the facts in the record which are in controversy between the parties, all of which were before the State courts in the custody litigation, we shall be guided by the observation made by Judge Goodrich in *Singer* v. *A. Hollander & Son, Inc.*, 202 F. 2d, 55, 56 (U. S. C. A. 3rd, 1953) where a summary judgment for the defendants was affirmed. There this Court said:

"The facts which are the background of this particular piece of litigation have been stated so many times that we shall not waste good printers' ink and law library shelf space by a long recital of them. They were fully stated and considered by Judge Forman in the district court 110 F. Supp. 71, and were likewise set out in litigation between the parties in the case of A. Hollander & Son v. Imperial Fur Blending Corp., 1949, 2 N. J. 235, 66 A. 2d 319. * * * "

Those controverted facts are as follows:

1. Plaintiff Mrs. Seitz, Sr., accuses her daughter-in-law, the defendant Mrs. Seitz, Jr., as having deserted her husband (Seitz, Jr.) and their common home at Bernardsville, New Jersey. This is denied by Mrs. Seitz, Jr., who, in turn, asserts that it was the husband who was the deserter. This question was necessarily before the State court, where Mrs. Seitz, Jr. was by final judgment awarded alimony for herself and support for the children (11a). (See also final judgment awarding support and maintenance for the wife and the three children and directing the defendant-husband to pay counsel fee, 37a.) This final judgment was affirmed by the Appellate Division on December 21, 1949, the affirming opinion being reported in 6 N. J. Super. 65 (12a). Alimony is never at final hearing awarded to a deserting wife. The question as to who deserted whom is not only settled by the State judgment in favor of the wife but is altogether immaterial in respect of the petitioner's causes of action asserted in her complaint in the District Court.

2. There are proofs seeking to establish that the plaintiff Mrs. Seitz, Sr. is a religious bigot. This is denied by her and she asserts that, on the contrary, she is without racial or religious bias. This factual dispute is wholly immaterial.

3. Plaintiff Mrs. Seitz, Sr. accuses the defendant Mrs. Hayes of being a fanatic Catholic and that she conspired with others to teach the infant plaintiff to disregard truth, to commit the sin of lying, to believe that "Mary, the Mother of God, was not a symbol of love but a saint who delights in 'knocking off' the fathers and grandparents of little boys." This claptrap was denied by Mrs. Hayes (52a). Plaintiff Mrs. Seitz, Sr. asserts that the wedding ceremony between her son and Mrs. Hayes' daughter, which occurred in 1942, was punctuated with religious difficulties as to whether the ceremony should be performed by a Catholic priest or a Protestant minister. There is dispute as to what occurred at the wedding, but the immateriality of the foregoing disputes is patent.

4. The elder Mrs. Seitz asserts that Mr. Toolan's attorney, Judge Brogan (former Chief Justice of the New Jersey Supreme Court) perpetrated a "daring lie" about her and defamed her before the New Jersey Bar Examiners (96a). Judge Brogan is not a defendant in the case and said assertion against him cannot conceivably bind the defendants here. It is pertinent here to state that the Board of Bar Examiners in its report to the New Jersey Supreme Court (affirmed by that court of last resort) points out that the young Mr. Seitz is a Protestant and his wife a Roman Catholic, and that religious differences played a large part in the creation of their marital difficulties, "particularly with respect to the custody and rearing of their children." That Board in its opinion further said that it is "obvious that the complainant Helen G. Seitz herself was not richly endowed with religious tolerance, as indicated by Mr. Brogan * * *" (20a). We say that this controversy is altogether immaterial.

5. There is dispute as to whether the plaintiff Mrs. Seitz, Sr. was the author or merely the transmitter of the scurrilous anonymous letter, which was in evidence in the cus-

tody proceeding and which appears here at 38a, *et seq.* The resolution of that dispute is of no materiality to the torts alleged in petitioners' complaint below.

6. Plaintiff Mrs. Seitz, Sr. states that the defendant Isabelle S. Seitz taught Greg that his grandmother (the plaintiff Mrs. Seitz) was a witch and to hate and fear the Jewish race and to forget wrongdoing when going to confession, especially the wrongdoing of his mother and his maternal grandmother (119a). The defendant Isabelle S. Seitz, in her reply affidavit, denies this and asserts that she is a true and devout adherent of the Catholic faith, was taught by her parents, and in turn taught her three children, to believe implicitly in the Catholic faith and to fear God, and at the same time to respect all religions different from the Catholic faith, and to be honest and truthful (par. 10 at 17b, *et seq.*). These disputed facts are immaterial.

7. Mrs. Seitz, Sr. seeks to impeach the judgments of the State Judges Rogers, McLean and Burton as decisions all or some of which she calls "infamous." This is related to the custody litigation in the State courts. The alleged "infamy" is negated by the two adverse decisions at the trial level, the second of which was unanimously affirmed and stands removed from collateral challenge or attack.

8. Mrs. Seitz, Sr. states that the infant Greg ran into the automobile and begged to be taken away, that the father removed him to Florida and by so doing "placed himself in contempt of the New Jersey courts" (127a). Evidence before Judge McLean was clearly to the effect that the boy was kidnapped, but whether kidnapped or not, the fact is undisputed that he was *removed* by his father and grandfather and, until he was taken to Florida, was harbored in the home of Mr. and Mrs. Seitz, Sr., where by her own admission she supplied the son, Arthur, Jr., and Greg with food (64a, 170a).

ARGUMENT

(All emphasis ours unless otherwise stated)

Petitioners present six points in support of their application for certiorari. All those contentions were advanced both before the District Court and the Court of Appeals. The District Court held those positions to be untenable and the Court of Appeals, referring to all the questions raised by the appellants (petitioners on this application) said in its unanimous opinion of affirmance (*supra*):

> "All questions here presented by appellants were raised in the district court and were there carefully considered and correctly decided. The opinion of the district court allowing summary judgment against the plaintiffs is clearly right."

We here deal with those questions in the same way as we met them recently in the Court of Appeals and initially in the District Court before Chief Judge FORMAN.

POINT I

The defendants' motion for summary judgment was seasonably made.

Under Point I petitioners argue that there is error in the proceedings below in that the motions for summary judgment were made without answers having first been filed by the defendants. This point is sought to be supported by the citation of *Hooven, Owens, Rentschler Co.* v. *Royal Indemnity Co.*, 1 F. R. D. 526 (D. C. S. D. Ohio, 1940). As is pointed out in Judge FORMAN's opinion (p. 46 of petition for certiorari), the District Court Judge who decided that case expressly stated that he made his ruling "without meaning to establish a precedent" (p. 528 of the cited opinion). As against the *Hooven* case Judge FORMAN relied on *Miller* v. *Hoffman*, 1 F. R. D. 290 (D. C.

N. J., 1940) (erroneously cited as being reported at p. 209). There Judge Avis held that Rule 56(b) was controlling against the same contention as is made by our adversary under Point I of his present application. Judge Forman also cited 6 *Moore's Fed. Practice*, 2049.

Our adversary seeks to escape the force of the decision in *Miller* v. *Hoffman*, *supra*, by saying, at page 13 of his brief, that in the *Miller* case the court expressly stated that the case was *at issue*, while in the instant case the issue had never been joined. Adverse counsel has not examined the *Miller* case with care. There a third party, brought in as such, filed an answer *and counterclaim*. It was against the third party's counterclaim that there was aimed a motion for summary judgment. True, the *Miller* case was at issue, but only as between the original plaintiffs and the original defendant. It never was at issue with respect to the counterclaim, against which the process of summary judgment was successfully employed. Judge Avis stated in the second paragraph of his opinion (p. 291) as follows:

> "The case appears to be at issue with the exception that Hoffman has not as yet filed an answer to the counterclaim. In the meantime defendant Hoffman moves for summary judgment as against the counterclaim of Matthews * * *."

The *Hooven* case, *supra*, upon which appellants rely, is a lone ruling midst a sea of contrary authority. Judge Forman *cited only Miller* v. *Hoffman*, but we submit additionally the following seven decisions, in each of which the same point was raised and in each of which the court held that Rule 56(b) was controlling and that a defendant to a claim, counterclaim or cross-claim may "*at any time*," *and before answer*, move for summary judgment:

> *U. S.* v. *Gray*, 59 F. Supp. 665, 667 (D. C. S. D. N. Y., 1945). Here Judge Goddard cites *Miller* v. *Hoffman*, *supra*, and Moore's Federal Practice.

Poe v. *Cristina Copper Mines*, 15 F. R. D. 85, 86 (D. C. Del., 1953). In this case too the plaintiff relied on the Hooven case, but Judge RODNEY perceived no authority in that decision and suggested that the case was difficult to understand. Judge RODNEY said (at bottom of p. 87):

"The plaintiff places some reliance on Hooven, Owens, Rentschler Co. v. Royal Indemnity Co., D. C., 1 F. R. D. 526, where a motion for summary judgment was filed before answer and the court required answer before disposing of the motion for summary judgment. The case is somewhat difficult to understand but adds little to the solution of the present difficulties."

Gifford v. *Travelers Protective Ass'n*, 153 F. 2d 209 (C. C. A. 9th, 1946);

Lindsey v. *Leary*, 149 F. 2d 899 (C. C. A. 9th, 1945);

Viking Press, Inc. v. *Goldman*, 38 F. Supp. 1014 (D. C. S. D. N. Y., 1941);

Carroll v. *Pittsburgh Steel Co.*, 100 F. Supp. 749 (D. C. W. D. Pa., 1951);

Miller v. *International Freighting Corp.*, 97 F. Supp. 60 (D. C. S. D. N. Y., 1951).

Implicit in the last cited case is a rejection of the holding in the *Hooven* case, though the latter is not cited. In the *Hooven* case the point which seemed to have some significance with the court is that the period of limitations there relied on by the defendant was not statutory but one stipulated in the contract between the parties. Hence in that case the court required the defendant's answer. In the *International Freighting Corp.* case, *supra*, the limitations, too, were stipulated in a contract, yet the New York District Court regarded that circumstance as immaterial and sustained the motion for summary judgment made before answer. (See top of p. 61 of the opinion in that case.)

The *Hooven* case has also been criticized in articles appearing in 4 F. R. Serv. 938 and in 6 F. R. Serv. 815. The *Hooven* case was decided at the District Court level and does not appear ever to have been followed or approved in any other reported case. The seven decisions we rely on were all decided later and two of them by the U. S. Circuit Court of Appeals for the 9th Circuit.

It is submitted that Point I of the petition is unsupported by any authority, is in conflict with Rule 56(b) and with the seven decisions hereinabove cited by us.

We do not regard the decision cited at page 14 of the petition as at all pertinent. *Halberstadt* v. *New York Life Insurance Co.*, 194 N. Y. 1, is a decision from the state court and rests upon local procedure. As was said by Judge FORMAN in *French* v. *U. S. Fidelity & Guaranty Co.*, 88 F. Supp. 714, 724 (D. C. N. J., 1950): "In determining how a defense may be raised in a federal district court, the Federal Rules of Civil Procedure not the rules of a state court are controlling."

At page 14 of the petition it is asserted "that it is uncontested that the contempt proceedings against the plaintiff Helen G. Seitz were determined in her favor." Petitioners err seriously in making this statement, since a reading of the undisputed facts in the record, set forth in the opinion of Judge FORMAN and discussed by us under Point II of this brief, plainly shows that there never was any successful termination of the contempt proceeding, such as is sufficient in law to sustain the tort of malicious prosecution alleged in the complaint of the petitioner Helen G. Seitz.

Petitioners assert at page 14 of the petition that the defense in the District Court, that the dismissal of the con-

tempt proceeding was the result of a settlement, was an affirmative defense and that being so, it should have been pleaded affirmatively because of the requirements of Rule 8(c) of the Federal Rules of Civil Procedure. This is tantamount to saying that matters which might be pleaded affirmatively by way of answer may not be presented under a motion for summary judgment. The contrary is the settled law. Rule 8(c) specifies many of the defenses which are affirmative in character, amongst them being the defense of *res judicata*, statute of limitations, and release. In *Hartman* v. *Time*, 166 F. 2d 127 (C. C. A. 3d, 1947), cert. denied (1948), 334 U. S. 838, 68 S. Ct. 1495, 92 L. ed. 1763, defendants were permitted by motion for summary judgment to present what in essence was a plea of *res judicata*. In the footnote at page 131 of the report of the opinion of the Court of Appeals is stated the following:

> "It will be noted that matter in support of the defense of res judicata is set forth in the defendant's motion. See Federal Rules of Civil Procedure, Rule 8(c), 28 U. S. C. A. following Section 723c. Formal pleas have been abolished by the Rules and a defense of this kind may be raised either by motion to dismiss or in the answer."

In *Gifford* v. *Travellers Protective Ass'n, supra*, summary judgment was rested upon laches or failure to bring suit within a prescribed period of limitations.

In the following cases the process of summary judgment was approved, despite the fact that the action rested on matter of affirmative character:

> *Carroll* v. *Pittsburgh Steel Co.*, 103 F. Supp. 788 (D. C. W. D. Pa., 1952). There the court pointed out that the defense of the bar of the statute of limitations is an affirmative defense and referred to Rule 8(c), but

added: "However, this does not mean that this defense may not be raised and considered on a motion for summary judgment filed prior to an answer."

Miller v. *International Freighting Corp.*, 97 F. Supp. 60 (D. C. S. D. N. Y., 1951)—summary judgment based on time limitation stipulated in contract.

In *Miller* v. *Hoffman, supra,* summary judgment was based on the fact of release. There, as here, resistance was rested on Rule 8(c), the plaintiff contending that the defense of release had to be pleaded affirmatively by answer and not by motion under 56(b). The court held differently.

POINT II

The court below correctly held, on undisputed facts, that the dismissal of the contempt proceeding was the product of compromise and consent. It was also procured by the plaintiff Mrs. Seitz and taken by her as a matter of favor.

Wholly uncontroverted is the cumulative testimony of the defendant Romond and the Prosecutor, Mr. Spritzer. The trial of the contempt proceeding against Mr. and Mrs. Seitz, Sr. and their son Seitz, Jr. had been noticed for January 23, 1953. Previously thereto the Prosecutor had endeavored to work out some arrangement with Mr. Romond and Mr. Gottschalk (the latter the attorney for Mr. Seitz, Sr. and the fugitive Mr. Seitz, Jr.) under which the missing boy would be returned from Florida and restored to the custody of his mother and acceptable rights of visitation given to the absent father. After the matter was noticed for trial, Gottschalk informed the Prosecutor that his efforts to persuade Seitz, Jr. to return the child to New Jersey had failed. Gottschalk suggested to the Prosecutor that a practical solution would be if *all* contempt proceedings would be dismissed, including the one pending against

the young mother for having taken her two children to Florida (for reasons of health). The Prosecutor was of the opinion that Mr. Seitz, Jr. could not be extradited for the kidnapping but that even extradition of the younger Seitz would not of itself restore the boy to his mother. This view of the Prosecutor and the said proposal of Gottschalk were expressed by the Prosecutor to Romond. Mr. Romond, after conferring with the young Mrs. Seitz, notified the Prosecutor that she was agreeable to the proposal that *all* the contempt matters be dismissed, *except* as against her absent husband. This the Prosecutor communicated to Gottschalk and it was agreed between Romond, Gottschalk and the Prosecutor "that the proposal should be laid before the Court" (80a). This was done on the trial date, January 23, 1953, before Judge McLean. Present were the Prosecutor, Mr. Gottschalk and *Mrs. Seitz, Sr. She was present throughout the entire hearing and heard the Prosecutor state to the Court "that the parties desired that both contempt proceedings be discharged, except as against Arthur M. Seitz, Jr."* (81a). The Prosecutor urged the court to approve of that settlement and disposition. The Judge hesitated only because he considered the contempt as one against the court itself. Judge McLean said that he would think about it and reserve the signing of any order. At no time during this session did Mrs. Seitz, Sr. address the court or ask to be heard. She was not without experience in addressing courts. She had a year before addressed Judge McLean in open court at the time she admitted that the missing boy and his father were living on her estate and that she was feeding them (64a and 170a). She also heard Mr. Gottschalk offer to draw two orders, one dismissing the contempt proceedings against the elder Seitzes and the other dismissing the pending contempt proceeding against the younger Mrs. Seitz. She did not in any way express her dissent.

During the four weeks that Judge McLean had the proposal under advisement she harangued the Prosecutor with letters and dozens of telephone calls, but at no time did she in any way indicate that the proposal of dismissal (mutual dismissals) made before Judge McLean was not by her wish or assent (83a). On the contrary, she wrote Judge McLean a letter on February 6, 1953, and asked him "to be so gracious and judgely as to sign the order dismissing the charges against my husband and myself" (81a).

In her affidavit in response to the motions for summary judgment, the plaintiff Mrs. Seitz, Sr. furnishes one paragraph taken from her said letter to Judge McLean (bottom of 128a). She notes that the Prosecutor, Mr. Spritzer, had not in his affidavit furnished the entire letter, particularly one certain paragraph which she then proceeds to furnish. That added paragraph is interesting. It shows that while the compromise proposal was being considered by Judge McLean, Mrs. Seitz, Sr. made an effort to have included in the dismissal order the contempt against her absent son. She clearly indicates that the dismissal of the son is something that should be done "if Isabelle Seitz and her mother are to be set free of their deliberate contempt * * *" (128a). This seems to be a very clear indication that she knew and understood that the proposal which was made to Judge McLean in her presence on January 23d called for mutual dismissals, excepting only the contempt against the younger Mr. Seitz. This paragraph and the other one at 128a both indicate not alone knowledge of the proposal under advisement by the court but assent thereto and request for its judicial approval.

Petitioners do not in their petition confine themselves to the two paragraphs of Mrs. Seitz' letter (only those two paragraphs are in evidence) but in the petition he indulges himself the license of printing the entire letter (pp. 19-24

of petition). This letter was never offered by either party or received in evidence. Neither party ever submitted the whole letter to the court below. Each side contented itself with one excerpt therefrom. We respectfully suggest that petitioners may not enlarge upon the proofs which were before Judge FORMAN and upon which the court resolved the application for summary judgment. However, since the whole letter was by means of inclusion in Mrs. Seitz's brief in the U. S. Court of Appeals brought to that court's attention and is now included in the Petition for Certiorari addressed to the Supreme Court, though not properly a part of the record on review, we are constrained to make some comment upon it, even though we think and request that this Court should disregard so much of the letter as was never introduced in evidence in the District Court. The letter is clearly a rehashing of the testimony in the custody action which had finally terminated in 1949. It is also an attack on Judge BURTON's opinion, saying that Judge BURTON himself admitted in court "that his memory is remarkably faulty and not to be relied upon" (petition, p. 21). In the same letter she characterizes the opinion of Judge BURTON as "the perjurious opinion of Mr. Burton" (petition, p. 22). Again in that letter she makes two statements about her alleged innocence in relation to the contempt charges, neither of which statements has the slightest support in any of the proofs before Judge FORMAN. She states that the contempt charges "had been investigated by Mr. Spritzer and which he had found to be without foundation" (petition, p. 20). Later in the letter she said that Mr. Spritzer investigated the charges in the contempt and that she and her husband had been found "innocent" by Spritzer (petition, p. 22). Not only are these statements no part of the record on appeal but they manifestly are self-serving declarations made by Mrs. Seitz in her letter to Judge MCLEAN for the purpose of inducing that judicial officer to approve the proposal of settlement

submitted in her presence and without her protest or dissent, and even seeks to have included in the court's action a dismissal of the contempt charged and then pending against her son. Except for the two paragraphs which are contained in the *affidavits* before the District Court, the whole letter is nothing more than harangue and is replete with hearsay, self-serving declarations and a criticism of matters then already at rest by final adjudication.

It is of considerable significance that her assertion in her letter that the Prosecutor, Mr. Spritzer, found her and her husband "innocent" stands without any supporting proof from Mr. Spritzer, Mr. Gottschalk (Mr. Seitz, Sr.'s attorney) Mr. Seitz, Sr., and even Mrs. Seitz, Sr. herself. Even if the whole letter had been offered and received in evidence in the court below, the statements therein contained would be only hearsay and not be probative of the Prosecutor's views and conclusions.

The District Court in its opinion held that "the dismissal of the contempt proceedings against Helen G. Seitz was a part of a compromise agreement for mutual dismissals of contempt charges against adverse parties" (207a) and that "accordingly the dismissal did not amount to a successful termination of the prior prosecution such as will support a cause of action in malicious prosecution" (208a). Judge Forman pointed out that the facts upon which this conclusion was based are confirmed in every respect by the affidavit of the Prosecutor (207a). Judge Forman cited 54 C. J. S. 1019 to 1027, which includes the general rule that a dismissal which is the product of compromise is not such a termination as is essential to the maintenance of a malicious prosecution action. He also cited the case of *Halberstadt* v. *New York Life Insurance Co., supra.* In that case Judge Hiscock, speaking for the New York Court of Appeals, lays down the rule that where

the earlier proceeding was terminated without regard to its merits or propriety by agreement or settlement of the parties or by the procurement of the dismissal as a favor to the accused, there is no such termination as supports an action for malicious prosecution.

The rule laid down in *Corpus Juris Secundum* and in the *Halberstadt* case has been observed and enforced in 64 reported cases in 25 state jurisdictions, all as footnoted in *Corpus Juris* (*Primus and Secundum*). It would unduly prolong this brief to list those decisions. In many of those cases the text from *Corpus Juris* is quoted in the opinions, and quite a few of them cite the *Halberstadt* case.

We conclude this point by citing two cases from the Massachusetts jurisdiction. In *Parker* v. *Farley*, 10 Cush. 279 (Sup. Mass., 1852), the defendant in the earlier action applied to the criminal court for an order on the prosecuting attorney requiring him to enter a *nolle pros.* of an indictment on the ground of some agreement on the part of the prosecutor. Chief Justice SHAW was of the view that "when a *nolle prosequi* and discontinuance is entered by *consent*, or by way of *compromise*, or where such exemption from further prosecution has been demanded as a right, or sought for as a *favor*, by the party prosecuted" there has been no successful termination. In that case the decisive fact shown by the record was that the plaintiff in the antecedent action had endeavored to exempt himself from trial "by requiring the District Attorney to enter a *nolle prosequi*."

In the later case of *Langford* v. *Boston & Albany Railroad*, 144 Mass. 431 (Sup. Ct. Mass., 1887), Chief Justice MORTON said:

> "But our cases uniformly hold that, where a nolle prosequi is entered by the procurement of the party prosecuted, or by his consent, or by way of compro-

mise, such party cannot have an action for malicious prosecution," citing *Parker* v. *Farley*, *supra*, and other Massachusetts cases.

We respectfully submit that by the undisputed evidence in this case the dismissal by Judge McLean of the contempt order to show cause was by the procurement of Mrs. Seitz, Sr. and by her consent and in fulfillment of a compromise between the contending parties, presented to the court in her presence where she appeared as attorney *pro se* and might have expressed dissent. She not only did not dissent but took the benefits of that compromise, the dismissal of the contempt charge and the return of the nominal bail posted by her when she was detained for a few hours the day of the arrest.

POINT III

The uncontroverted evidence showed probable cause and therefore the question was one of law for the court and not for a jury.

We have elsewhere above in this brief shown the uncontroverted facts that when Greg was removed from his mother's home he was taken to the Bernardsville home of Mr. and Mrs. Seitz, Sr., that the gates to the estate were padlocked and ordinary access thereto barred, that the Seitzes evaded service of the Court's order to show cause, that the undersheriff was obliged to enter the estate by some back way, that Mrs. Seitz shouted from an upper window that if he had papers in contempt she wouldn't take them because personal service was required, and that she personally appeared before Judge McLean on January 22, 1952, and admitted that Greg and his father were upon her premises and that she supplied the food to them. It was upon these undisputed facts and her own admission to Judge McLean in open court that he ordered a warrant

for her arrest. Judge FORMAN held that the undisputed facts were sufficient to establish that there was probable cause for the issuance of the contempt warrant and clearly warranted the belief that she was guilty of the contempt. He therefore concluded (208a) that the issue of probable cause is a question of law and not one for the jury, citing *Shoemaker* v. *Shoemaker*, 11 N. J. Super. 471, 475 (App. Div. N. J., 1951), opinion by Judge BRENNAN (now Associate Justice of the New Jersey Supreme Court). There it was held that "where the facts are not controverted, the question of reasonable or probable cause is one of law to be determined by the court and its submission to the jury is error," citing *Vladar* v. *Klopman*, 89 N. J. L. 575 (E. & A., 1916).

In *Vladar* v. *Klopman*, *supra*, the trial judge had submitted to the jury the question of probable cause where the facts upon which that question depended were uncontroverted. Chief Justice GUMMERE said (p. 578 of the report):

> "But where the facts are not controverted the question of probable cause is one of law to be determined by the court, and its submission to the jury is improper." Citing five earlier cases.

In the *Vladar* case it was held that the submission to the jury of the question of probable cause was reversible error. It is there stated that the reason for the rule which makes the existence or non-existence of probable cause, when the facts are not in dispute, a matter to be determined by the court is an outgrowth of public policy, so that the citizens might be encouraged to put into motion the machinery of the criminal law against "apparent violators" and do so with a sense of safety and without being muleted in damages if the prosecution should fail because of lack of proof or because of the vagaries of the trial jury. If this public

policy be sound in criminal matters, how much more so in civil matters.

The question of what is probable cause is a matter of substantive law, controlled by the law of the forum. We therefore perceive no virtue in adverse counsel's reference to cases in other jurisdictions. However, the eight cases cited by him at pages 28-29 of the petition are wholly out of point. *Daniel* v. *Pappas*, *Bowland* v. *Ballaine*, *Pence* v. *Melvin*, and *Good Holding Co.* v. *Boswell* were all cases in which there were disputed facts touching the issue of probable cause. In *North British, etc.* v. *Feldman* the proofs were conflicting and, further, there had been an arrest without a warrant. *Jillson* v. *Caprio* was a false arrest case where malicious prosecution was not sought to be maintained. *Bucher* v. *Krause* too was a false arrest case where no warrant had been issued; malicious prosecution was not there involved. The last case cited by counsel, viz., *Seaboard Oil Co.* v. *Cunningham*, 51 F. 2d 321 (C. C. A. 5th, 1931), gives petitioners no sustenance. That case is definitely authority in our favor. There the Court of Appeals held that "in a clear case, on undisputed facts, probable cause is a question of law for the court," citing *Brown* v. *Selfridge*, 224 U. S. 189 (1912), 32 S. Ct. 444, 56 L. Ed. 727. In the *Selfridge* case Mr. Justice Day, speaking for a unanimous Supreme Court, said (last paragraph of the opinion) that "in clear cases, the question of probable cause being one of law, for the court, we think that there was no error in taking the case from the jury."

We respectfully submit that Judge Foreman's treatment of "probable cause" was, in the light of the uncontroverted facts, sound judicial action and supported by the highest authority, both local and federal, and that the U. S. Court of Appeals correctly affirmed his view and action.

POINT IV

The Court below was correct in giving summary judgment against the alleged causes of (A) false imprisonment and (B) abuse of process.

(A) False Imprisonment

Wholly uncontroverted is the fact that Mrs. Seitz, Sr. was arrested under a warrant (75a) issued by Judge McLean on his own motion and despite the efforts of Mr. Romond to dissuade the court from even issuing a writ of *habeas corpus* (62a). It was the Judge who said that he had changed his mind and that instead of *habeas corpus* he would direct that a warrant be issued (63a). Even when Mr. Romond presented the order for a warrant he endeavored to persuade Judge McLean "that perhaps for the present it might be better to proceed by a writ of *habeas corpus* than by an arrest" (65a). This effort was rejected by the court for the stated reason that the Seitzes had offended against the court itself and that they had committed a criminal contempt which concerned the State and that he considered an arrest the only effective way of dealing with the situation. Not only is there no proof that any of the defendants sought the arrest of Mrs. Seitz but, on the contrary, the only evidence in the case is that Mr. Romond struggled very stoutly to avoid an arrest and to confine the process to the writ of *habeas corpus*, which involves no arrest.

The Superior Court of New Jersey is a court of general civil and criminal jurisdiction and the judges thereof are accordingly possessed of an original jurisdiction in all matters, including enforcement of its orders by contempt proceedings. The order to issue the warrant for arrest (73a) is regular on its face. The warrant (75a), issued under that order, is regular on its face and was issued by Judge Goldman of the Superior Court, he holding the permanent

vicinage in which the Seitzes lived. Further, as pointed out by Judge FORMAN in his opinion at 209a, an order for arrest is one of the alternative methods available to the court under New Jersey Rule 3:8-2(a) (formerly Rule 2:8-2a). Upon the foregoing facts there can exist no cause for false arrest.

The law governing the point under discussion was stated with great clarity in a case where the wrong person was arrested under a bench warrant, which constituted valid process. In that case, *Schneider* v. *Kessler*, 97 F. 2d 542 (C. C. A. 3d, 1938), the Court said (at p. 544 of the report) the following:

> "As a matter of law, if the plaintiff was the person intended in the indictment and warrant, even though he should not have been indicted, the defendants were not liable. That the arrest and imprisonment were pursuant to a valid process constitutes a defense 'available to the party procuring its issuance, the judicial officer issuing it, * * * the official to whom it is addressed, and those who assist him', 25 C. J. 477."

We need cite very few cases of the local law. Those we here furnish are of more recent date but they correctly reflect the law that is uniform throughout the land.

In *Earl* v. *Winne*, 14 N. J. 119, 128 (1953), it was stated that "the fundamental difference between an action for malicious prosecution and one for false imprisonment is that in the former the detention is malicious, but under the due forms of law, *whereas in the latter the detention is without color of legal authority*," citing *Pine* v. *Okzewski*, 112 N. J. L. 429, 432 (E. & A., 1934). In 35 C. J. S. 532, §27, are footnoted 17 cases from 15 jurisdictions, including the decision in *Schneider* v. *Kessler, supra.* All those cases stand firmly for the principle that where the arrest

is ordered by a court having the general jurisdiction so to do and the proceedings are regular on their face, no action for false arrest can be maintained, even where in the exercise of its jurisdiction the committing judge acts erroneously.

However, our adversary argues that because the petition in contempt of Mrs. Seitz, Jr. initiated the proceeding in which the arrest was later ordered, she and the other defendants are liable for the arrest. This assertion completely overlooks two circumstances which are dispositive of his point. One is the rule of law expressed by the appellate court in *Schneider* v. *Kessler, supra,* to the effect that if the process under which occurred an arrest and imprisonment is valid such process is a defense "to the party procuring its issuance, the judicial officer issuing it, the official to whom it is addressed, and those who assist him." The other circumstance is that Mr. Romond presented the young mother's petition and prayed only that the Seitzes "should be dealt with by the court accordingly." This put it up to the court to do what it, the court, considered appropriate. The court issued an order to show cause. Mrs. Seitz, Sr. evaded service. The court then decided to issue a writ of *habeas corpus* and thereafter, changing its mind and despite the dissuading efforts of Mr. Romond, directed the warrant for arrest. We say that in the circumstances present before Judge McLean, and particularly in the light of Mrs. Seitz' admission that on her estate she was supplying food to the fugitive father and the kidnapped son (this amounted to harboring the abducting father and the abducted child), the order was a sound exercise of the jurisdiction which the court possessed under the rule above adverted to. But whether sound or not, the court's order was jurisdictionally valid and that puts an end to any claim for false arrest.

An early case which is in point is the New York case of *Percival* v. *Jones*, 2 Johns. Cases 49. In reliance upon it the text in 21 A. L. R. 2d 670 is as follows:

> "The action for false imprisonment being for a trespass, the wrong must be attributable to the defendant's act or procurement or that of his attorney. *It is not enough that he was the plaintiff in the case in which the arrest occurred.*
>
> "If the defendant left it to the Justice to issue such execution as the Justice thought proper, he is not liable for a false arrest resulting from the justice's error."

In the case of *Bierwith* v. *Piersonnet*, 65 Missouri Appeals, 431, where the defendant, sued for a false arrest, had actually ordered that the plaintiff be arrested, the court said:

> "If the arrest of the plaintiff was lawful, an action for false arrest will not lie; and *it can make no difference at whose instigation it was made or what the motive was.* This must be so in reason, for there can be no trespass where the arrest is by warrant of law." Citing *Burns* v. *Erben*, 1 Robt. 555; *O'Connor* v. *Bucklin*, 59 N. H. 589; *Davis* v. *Burgess*, 54 Mich. 514; Waterman on Trespass, §367 note.

Kendel v. *Guterl*, 84 N. J. L. 533 (Sup., 1913), was a suit for false imprisonment. The defendant had sworn to a complaint which, in turn, was the basis of a warrant under which the plaintiff had been arrested as a disorderly person. Although the complaint was held to be manifestly insufficient, the defendant was nonetheless held free of liability and the plaintiff's judgment below was reversed. This result was rested on the fact that *the defendant had not asked that an arrest take place* and that what he did was on the advice of the magistrate. The court said, at page 535 of the report:

> "It does not appear that the defendant asked to have plaintiff arrested or knew that he was to be arrested, or that he did aught but what he was advised and instructed to do by the magistrate. We have, therefore, the case of a complainant stating the facts honestly and truly to the justice, and asking, not for an arrest but for an ejection, and swearing, not to facts but to a conclusion of law under the advice and instructions of the magistrate. *What followed was not of his procurement and was not participated in by him in any way.*"

Plaintiff's alleged cause of action for false arrest is, because of the undisputed facts and the law applicable to it, not maintainable.

(B) Abuse of Process

The claim of abuse of process is not here maintainable. That species of *tort* is present only where process is perverted after its regular issue. *Ash* v. *Cohn*, 119 N. J. L. 54, 58 (E. & A., 1937); *Hoppe* v. *Klopperich*, 28 N. W. 2d 780, 790 (Minn. Sup. Ct., 1947); *Prosser on Torts*, §98; 1 *Cooley on Torts* (4th ed.), §131, p. 437; *Anno.*, 80 A. L. R. 580; *Restatement-Torts*, §136(b), comment (c); 40 *Harv. L. Rev.* 502 (note).

Paragraph 41 of the amended complaint asserts that there was an abuse of process because of three reasons there stated. One is that Mrs. Seitz was not a party to the action. We deem it unnecessary to cite authorities that process in contempt may issue against persons not parties who aid and abet persons who are parties. The second reason given is that plaintiff was never served with the order to show cause in contempt. Our answer is that she knew of the contempt, that she evaded service of the order, that she did appear at the contempt hearing on January 22d, and that under N. J. Rule 3:8-2(a) there need

be no order to show cause and that the first process may be an order for arrest. The third ground given is that the warrant and the arrest were used for the sole purpose of forcing the return of the kidnapped boy. We have already shown that the order for the arrest was on the court's own motion to vindicate its own authority. It were no different than if Mrs. Seitz had assaulted the court. If it be assumed that the purpose was to compel the return of the boy, that purpose must be deemed a proper one. Contempt proceedings are an ancient and recognized method for compelling obedience to court orders, as was pointed out in the opinion below. Even if it were assumed *arguendo* that the purpose of the arrest was to force the respondents charged with contempt to return the kidnapped boy, that motive would be altogether immaterial in respect of the claim of false arrest. As was said in *Bierwith* v. *Piersonnet, supra*, where the alleged trespass is by warrant of law "it can make no difference at whose instigation it was made *or what the motive was.*" All of the foregoing contentions of petitioners were correctly overruled by the District Court. (Opinion at 208a to 211a; also at pp. 49 to 52 of the Petition for Certiorari.)

There is not one word of proof before the court that in the execution of the warrant there was used any excessive force or even that excessive bail was exacted. There is not one fact to indicate that the warrant was put to a perverted use.

POINT V

The District Court correctly gave judgment against the claim of conspiracy.

We have so far extended this brief that space for a full discussion under this point is not available to us. We think that all the appropriate legal authority and discussions of fact are very adequately set forth in Judge For-

MAN's opinion, where he deals with the alleged conspiracy to accomplish malicious prosecution, false arrest and abuse of process. We beg leave to rely on what the court said and cases cited in its opinion at 211a to 213a (Petition, p. 52 *et seq.*) and to add one thought and one citation.

There was not the slightest proof before the lower court that there had ever been any agreement or understanding between the defendants to commit the wrongs complained of. The count in conspiracy reflects a device not unknown to those who seek to escape various bars erected by law. Judge FORMAN in his opinion deals with so much of the plaintiff's complaint as sounds in defamation and which is barred by the one-year New Jersey Statute of Limitations. It is inconceivable that a plaintiff should be able to sustain a charge of conspiracy (the fourth count in the amended complaint) in respect of malicious prosecution, false arrest and abuse of process (the plaintiff's first three counts in the amended complaint), when those *torts* themselves were not committed. The like strategy of resort to a charge of conspiracy was employed in the case of *Reed* v. *Wilson*, 2 Monaghan's Reports (Pa.) 612. There the plaintiff charged that the defendant had entered into a *conspiracy* with the mother of a bastard child and induced her falsely to prosecute the plaintiff for fornication and bastardy, thereby causing his arrest. The Statute of Limitations of Pennsylvania at that time fixed two years for the bringing of an action for malicious prosecution or false arrest. In the cited case the court held that the plaintiff could not escape the bar of the Statute by bringing the action in the form and under the claim of a conspiracy. The defendant's demurrer was sustained and that action was affirmed on appeal.

In *Reed* v. *Wilson*, *supra*, reference is made to the case of *Hannum* v. *West Chester*, 63 Pa. 475 (Sup. Pa., 1870), where Judge SHARSWOOD said:

> "It is the nature of the cause of action, rather than the form of action, which determines the applicability of the statute." (Statute of Limitations)

We apply the foregoing holding to the case at bar. If the *torts* alleged in the first three counts of the amended complaint furnish no maintainable causes of action, then the alleged conspiracy to commit those *torts* is not maintainable. Transcending this idea is the fact that in New Jersey a civil cause of action for conspiracy does not exist, as was held in the *Van Horn* case, in the *Kamm* case and in the *French* case, cited in the opinion of Judge FORMAN (211a to 212a; also Petition, p. 52 *et seq.*).

POINT VI

The District Court was correct in giving summary judgment against the amended complaint of the infant.

It would be idle to attempt to develop this point beyond the painstaking treatment of it in the opinion below at 213a to 216a, where are considered the arguments and citations submitted by our adversary in support of Point VI of the petition. We need only add that the infant plaintiff is bound by the final judgment of the State court awarding his custody to his mother. Judge FORMAN very soundly points out at 216a that such judgment of custody must of necessity bind the child by its terms to the same extent that it does the contesting parents. Since the custody proceeding is intended for the benefit and welfare of the infant he is in a very real sense privy to the parties. It would be a monstrous situation if after a trial court decided that the welfare of a child required its custody in one parent, that child or anyone in its behalf could because of that result maintain an action against the custodial parent, or against counsel who by their professional labors achieved

the custody adjudication, or against the maternal grandmother who here retained counsel and paid them for their services to the impecunious mother. The infant is without interest in the alleged *torts* of malicious prosecution, false arrest and abuse of process. They are not the claims of the infant but of Mrs. Seitz, Sr. personally, and have already been discussed.

All the matters set up in the infant's amended complaint were before the State court in the custody proceeding. What is now said by petitioners both in behalf of the infant and for Mrs. Seitz, Sr. in respect of the custody action and the result therein, constitutes a collateral attack on a final judgment. This may not be done by either plaintiff, as was pointed out in the opinion of the District Court.

It will be observed that the proof offered by Mrs. Seitz, Sr. in support of the amended complaints is almost in its entirety based on "information and belief." It would appear that the only thing she is personally competent to testify to is the matter of her arrest and what happened in her presence when she appeared before Judge McLean as attorney *pro se*. The latter facts are undisputed and are against her asserted causes of action. As to the matters stated on information and belief, they may not be considered either for her or for the infant plaintiff.

The very recent case of *Ash* v. *Frazee*, 37 N. J. Super. 542 (N. J. Super. App. Div., October 28, 1955), involved the defendants' motion for summary judgment against plaintiffs' action for malicious interference with their business. The appellate court pointed out (at p. 547 of the opinion) that the plaintiffs' defensive affidavit did not meet the provisions of New Jersey Revised Rule 4:58-6, which requires that such affidavit "shall be made on personal knowledge and shall set forth only facts which are admissible in evidence and to which the affiant is competent to

testify." The court pointed out that the affidavit contained statements which were hearsay for all that appears and furnished no information indicating the nature and sources of affiant's knowledge. It was further noted that the court was not provided with the affidavit of any person having actual knowledge of the facts. The conclusion reached was that the appellate court was free to disregard the plaintiffs' answering affidavit and that there was therefore no genuine issue as to any material fact challenged and that the defendants were entitled to summary judgment as a matter of law. Such summary judgment was affirmed. The State rule above referred to was copied from Rule 56(e) of the Federal Rules of Civil Procedure. Mrs. Seitz' several affidavits in the record on review furnish no competent testimony and should be disregarded.

POINT VII

Additional reasons why defendants are not legally answerable.

In addition to the points already argued in this brief, we furnish the following observations why the defendants are under no legal liability:

As to Toolan and Romond:

They cannot be guilty of any *tortious* conduct either in bringing the custody action or, later, in presenting the petition in contempt. An attorney is not liable for bringing action for a client unless (a) such action is brought without the authority of the client or (b) "unless there be a conspiracy to bring a *groundless suit, knowing and understanding it to be groundless, and without any intent or expectation of maintaining the suit.*" Such was the opinion of Chief Justice SHAW in the old but leading case of *Bicknell* v. *Dorion,* 33 Mass. 478, 16 Pick. 478, 490 (Mass. Sup., 1835).

In the case at bar it is not even claimed that any of the said conditions of liability exist.

In *Schall* v. *Kingsley*, 42 N. J. L. 32, 33 (Sup., 1880), it was held that while an attorney merely acts as such, making use of the processes of the law to enforce his client's demand, he is not amenable to suit even if the client's cause is groundless and vexatious.

It is a matter of first importance to the bar and to the public at large that counsel be immunized from vexatious suits and malicious reprisals arising out of matters in which they served their clients by employing the recognized remedies allowed by law. This was well stated by the Federal Court in *Campbell* v. *Brown*, 4 F. Cas. No. 2,355, 2 Woods 349. There it was said:

> "The public interest demands this. If attorneys cannot act and advise freely and without constant fear of being harassed by suits and actions at law, parties could not obtain their legal rights. If not free to advise and defend those who seek their aid, the laws are made in vain. Injustice and oppression would rule highhanded in the land. * * * It is as necessary to the public weal that they should be privileged from molestation by actions and suits in the courageous performance of their duty as it is that the representatives of the people in the legislature or the judges of the courts should be thus privileged."

As to the defendant Mrs. Seitz, Jr:

For the reasons stated in the opinion below (215a), the action of the infant plaintiff against his mother is not maintainable. Nor can Mrs. Seitz, Sr. maintain an action for the alleged deprivation of the company of her grandson Greg. It is the parent who has the exclusive right to the custody of the child and courts will not compel parents to

share with grandparents such custody, or even require the parents to permit the grandparents to visit the child. See *Leith* v. *Horgan*, 24 N. J. Super. 516, 518 (decided 1953), and the cases of *In re Reiss*, 46 La. Ann. 347, 15 So. 151, 25 L. R. A. 798 (Sup. Ct. La., 1894); *Com. ex rel. Flannery* v. *Sharp*, 151 Pa. Super. 612, 30 A. 2d 810 (Super. Ct. Pa., 1943); *Odell* v. *Lutz*, 177 P. 2d 628 (D. Ct. App. Cal., 1947); *Bush* v. *Bush*, 342 Ill. App. 86, 95 N. E. 2d 121 (App. Ct., 1950). The *Horgan* case was reversed by the New Jersey Supreme Court but not on the point for which we have cited it. The Supreme Court opinion deals with the question of visitation of parents to an invalid daughter against the wishes of her spouse. The reversal is reported in 13 N. J. 467.

As to Mrs. Hayes:

There was no proof that she participated in the custody action other than to engage and pay counsel for her daughter and to testify as a witness therein. She was not even a party to those proceedings or, later, to the contempt proceeding. The record is barren of anything which was not privileged or lawful.

As to all defendants:

So much of the complaint as savors of alleged defamation against Mrs. Seitz, Sr. furnishes no tenable cause of action. If the introduction of the anonymous letter or anything said in the custody proceeding be considered within her charge of defamation, then all of such matters were pertinent to the then issue and were therefore privileged. Whether privileged or not, all of that happened long before the present action was brought and is barred by the New Jersey one-year Statute of Limitations, applicable both to libel and slander.

CONCLUSION

On the state of the record in this Court and for all the reasons advanced in this brief, it is respectfully submitted that the summary judgment under challenge was correctly entered in the trial court and properly affirmed by the United States Court of Appeals, that further review is not required, and that the application for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term 1956

No. 119

HELEN G. SEITZ and ARTHUR MacGREGOR SEITZ, III, an infant, etc.,

Petitioners,

vs.

JOHN E. TOOLAN, ISABEL HAYES, *et al.*,

Respondents.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioners,

vs.

JOHN E. TOOLAN, ISABEL HAYES, *et al.*,

Respondents.

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PETITIONERS' REPLY BRIEF

Petitioners, in their petition for a writ of certiorari, have convincingly shown that cogent reasons exist for allowance of the writ in the instant case.

Petitioners have shown that the granting of the motion for summary judgment in the instant case by the Court below is a clear departure from the well established Federal rule that a motion for summary judgment cannot be granted where there is a genuine dispute as to material facts and that the Federal Courts have always been zealous to protect a party's right to a trial when such dispute exists. The instant petition for writ of certiorari has cited therein all of the cases of the Supreme Court of the United States and the Courts of Appeals with which the instant decision is in conflict. Nevertheless, the respondents argue that this Honorable Court should not exercise its discretionary power of supervision since no "special" and important

reasons exist for the granting of a writ of certiorari. The writer can think of no more special and important reason for the granting of such writ than to review a decision which deprives petitioners of their day in court by granting a motion for summary judgment in a case where, admittedly, there are many controverted facts.

In this connection this Honorable Court's attention is directed to the fact that the respondents themselves set forth eight separate and distinct controverted facts in their brief. Although it will be shown, under Point II of this brief, that many far more strongly controverted facts exist in the instant case, the admission by the respondents that those eight controverted facts, exist, and particularly that the facts are controverted with respect to the alleged abduction of the infant plaintiff (item numbered 8 of the "Controverted Facts" above referred to) shows that the granting of a motion for summary judgment amounted to a deprivation of petitioners' substantial rights.

Insofar as the so-called "Uncontroverted Facts" are concerned, the respondents, under this heading, set forth a distorted history of the domestic struggles between the respondent Isabelle S. Seitz and Arthur M. Seitz, Jr., the son of the petitioner Helen G. Seitz and father of the infant petitioner. Although the petitioners had set forth the essential facts as they appear in the amended complaint of the petitioner Helen G. Seitz, at pages 4 to 9 of the instant petition, it becomes necessary, in view of the aforesaid distortion, to elaborate further on the history of the custody litigation as it appears in the amended complaint of the infant plaintiff.

Unlike the respondents, the petitioners will limit themselves to the facts as they appear in the instant record and will not indulge in the recital of facts which are not part of this record, although they may be part of the original custody litigation. The following additional facts

relating to the custody litigation appear from the infant petitioner's amended complaint.

In the year 1947, because of the constant interference of his mother-in-law, the respondent Hayes, and fearful that said respondent would succeed in breaking up his children's home, Arthur M. Seitz, Jr., father of the infant petitioner herein, sought the intervention of the Court of Juvenile and Domestic Relations of Somerset County, State of New Jersey, and on or about December 5, 1947, a week prior to the date set for the hearing of said petition the respondent Hayes prevailed upon the respondent Seitz to desert her husband's home and the infant petitioner herein, as well as his baby sister, Pauline. On or about December 12, 1947, in the Chambers of the Judge of the Juvenile and Domestic Relations Court, the respondents Tooland and Romond prevailed upon said Court not to proceed with the hearing by stating that the respondent Seitz intended to immediately file for divorce and for the custody of the three infant children, including the infant petitioner herein. By reason thereof Arthur M. Seitz, Jr., father of the infant petitioner herein, on or about December 15, 1947, commenced a divorce and custody action against the respondent Seitz, mother of the infant petitioner herein.

In the aforesaid divorce action the respondents Toolan and Romond, on behalf of the respondent Seitz, made a motion for the custody of the three minor children of the parties involved in said divorce action, including the infant petitioner herein. The custody proceeding came on for hearing on or about March 9, 1948, at which time the respondent Romond submitted numerous affidavits, among which were the companion affidavits of the respondents Hayes and Toolan, which latter two affidavits had a major bearing on the proceedings and by virtue of which the Court awarded the custody of the three children, including the infant petitioner herein, to the respondent Seitz pending the final hearing.

Due to the change of the court structure in New Jersey the final hearing did not come on until on or about November 12, 1948, before Judge Donald H. McClean. At said time, on the advice of three state psychiatrists who feared for the mental safety of the infant petitioner herein, the attorney for the father of said infant petitioner agreed, at a pretrial hearing, to abandon the divorce action and concentrate only on the custody of the infant petitioner at that time. Judge McClean, despite the testimony of three state psychiatrists and two psychiatrists engaged on behalf of the respondent Seitz, all of whom stated that the infant petitioner herein should not be returned to the custody of the respondent Seitz, nevertheless granted such custody to the respondent Seitz, with no right of visitation to the father of said infant petitioner. Said decision was unanimously reversed by the Appellate Division of the State of New Jersey in the month of February, 1949, with directions to retry the case on the proof already taken and such new evidence as might be offered. The Appellate Court, in its opinion, expressed concern for the welfare of the infant petitioner herein, suggesting that he be sent to his father to be kept by him until the hearing, thus indicating that it considered the petitioner Seitz's family and their home to be a proper place for the infant petitioner herein. The Court further stated that "there was much to show that the child would be better off and happier with his father than with his mother and no evidence at all to the contrary". Justice Bigelow, expressing the opinion of the Court, composed of Justices Jacobs, Eastwood and Bigelow, ruled that the happiness and welfare of the children should be placed above the rights of the estranged parents.

The rehearing in the aforesaid proceeding took place before Advisory Master William R. J. Burton on March 16, March 17, March 18 and ended on March 19, 1949, at seven-twenty P. M., and thereafter, and on or about June 6, 1949, said Advisory Master Burton again awarded

custody of the children, including the infant petitioner herein, to the respondent Seitz. During said hearing, and on March 17, 1949, the infant petitioner herein was brought to the chambers of said Advisory Master Burton ostensibly for an examination by the Court, no member of the petitioner Seitz's family being permitted to see said infant petitioner. He was then taken to the offices of the State psychiatrists where, according to their testimony, he suffered a harrowing and brutal experience at the hands of Dr. Flicker, a psychiatrist engaged on behalf of the respondent Seitz, after which the infant petitioner herein mysteriously disappeared and was not seen by any member of the petitioner Seitz's family for many months.

Although the decree of said Advisory Master Burton granted bi-weekly visitation to the father of the children, Arthur M. Seitz, Jr., effective on or about June 10, 1949, the infant petitioner herein had, by that time, been deprived of any contact with his father from on or about November 12, 1948 to June 10, 1949, a period of seven months, to the detriment of the welfare of said infant petitioner.

The lengthy mysterious disappearance of the infant petitioner herein was necessitated to prevent said infant petitioner from revealing why, according to the testimony of the psychiatrists, said infant petitioner had sought refuge under a rug from Dr. Flicker, whom he feared, and why the infant petitioner had screamed for an hour and a half that he "could stand no more abuse" and would prefer to "drown in the river", following his having been falsely told that his father and paternal grandparents were dead and for that reason he had better comply with the orders of those who held him in their power by court order.

An appeal was taken from the decree of Advisory Master Burton to the Appellate Division of the State of New Jersey, which affirmed the decree of said Advisory Master,

with the comment that it would serve no useful purpose to review the facts in the record. In or about the month of June, 1950, the father of the infant petitioner herein made an appeal, in affidavit form, to the Supreme Court of the State of New Jersey.

In or about February, 1951, the infant petitioner herein appeared at the home of his father, in Bernardsville, New Jersey, with a letter written by the respondent Hayes, from Florida, to the respondent Seitz, which revealed that the respondents Hayes and Seitz had entered into a scheme and plan to remove all three Seitz children permanently from the State of New Jersey. Upon learning these facts an application was made to restrain the respondent Seitz from removing the children from the state, which application was denied by Judge McClean. Thereupon an immediate appeal was taken to the Appellate Division and the matter was referred back to Judge McClean.

The father of the infant petitioner herein, having obtained new evidence and having retained one Walter Gottschalk as his attorney, started a new proceeding for the change of custody of the infant petitioner herein based upon serious charges against the respondent Seitz, and a hearing was set for June 26, 1951. The said respondent and the infant petitioner herein were personally served with process by the Sheriff of Monmouth County to appear at the hearing aforementioned but, despite that fact, the respondent Seitz failed to appear personally or produce the infant petitioner herein in court.

Upon being further informed by the infant petitioner herein that the respondents Seitz and Hayes were again planning to remove said infant petitioner from the State of New Jersey, the father of said infant petitioner made said facts known to Judge McClean, who issued an order of restraint on August 6, 1951, forbidding the removal of the infant petitioner herein from the State of New Jersey.

On or about September 7, 1951, the respondent Romond brought a motion on for the consolidation of the proceedings above referred to, which was granted by Judge McClean, despite strenuous objections by the attorney of the father of the infant petitioner herein. When the respondent Seitz was informed that a definite date had been set for a hearing in said proceeding she mysteriously removed the infant petitioner herein from the jurisdiction of the New Jersey courts, on or about November 9, 1951, in order to prevent said infant from testifying regarding her then culpability and from exposing those who had been responsible for his exhibition of fear and terror on March 17, 1949, as aforesaid.

During the interim, between November 9, 1951 and the secret return of the respondent Seitz in January, 1952, numerous motions were made on behalf of the father of said infant petitioner, through his attorney, in regard to the removal of the infant petitioner and his sister from the State of New Jersey by the respondents Seitz and Hayes, which deprived the father of his right of visitation to the infant petitioner and his sister and the deliberate and malicious creation of a situation which prevented the father from being able to see his youngest child, for whom the respondents Seitz and Hayes had shown a complete lack of affection and responsibility.

At a hearing before Judge McClean, held on January 4, 1952, the respondent Romond created the impression that he did not know the whereabouts of the respondents Seitz and Hayes, or the infant petitioner herein, and Judge McClean disqualified himself, stating that he would not further act in the Seitz matters until he received instructions from the Supreme Court of the State of New Jersey. On the next day, to wit, June 5, 1952, when the father of the infant petitioner herein drove to Allenhurst, New Jersey, by authority of the right of visitation given to him by court order, to again attempt to see his youngest child,

who had been left by the respondent Seitz with an aged woman since November 9, 1951, while said respondent was in Florida, where she had taken the infant petitioner herein in violation of the court order of Judge Burton, the infant petitioner suddenly ran down from the porch of the house of the defendant Hayes and jumped into his father's car and pleaded for sanctuary, and when his father hesitated the infant petitioner reacted violently and in like manner to his behavior as described by the three psychiatrists before Judge Burton in March, 1949.

The mental and physical condition of the infant petitioner herein at that time was such that the father of said infant feld duty bound to take him to doctors and psychiatrists for examination and help, and said doctors and psychiatrists advised him never to permit the infant petitioner to be returned to the home of the respondents Seitz and Hayes at Allenhurst, New Jersey (151a to 157a, incl.).

POINT I

The motion for summary judgment made by the defendants prior to interposing answer, is premature.

The respondents argue under Point I of their brief, that the case of *Hooven, Owens, Rentschler Co.* v. *Royal Indemnity Co.*, 1 F. R. D. 526 (D. C. S. D. Ohio, 1940) is a "lone ruling midst a sea of contrary authorities". However, the respondents were unable to cite any decision of this Honorable Court in which the meaning of Rule 56(b) in connection with Rule 8(c) of the Federal Rules has been authoritatively interpreted. The only New Jersey District Court decision relied upon by the respondents is *Miller* v. *Hoffman*, 1 F. R. D. 290 (D. C. N. J., 1940), which case has not been reviewed by this Honorable Court.

Aside from the fact that the *Miller* case was at issue, as admitted in the respondents' brief, the writer respectfully submits that the holding of the *Miller* case is entirely unsound and should be disproved by this Honorable Court.

United States v. *Gray*, 59 F. Supp. 665, 667, relied upon by the respondents is not in point. In that case, the defendants did not raise any affirmative defense and the Court based its decision simply on Rule 56(b). Thus there was no necessity for the Court to resolve the conflict between Rule 56(b) and Rule 8(c).

The case of *Poe* v. *Cristina Copper Mines*, 15 F. R. D. 85, 86 (D. C. Del., 1953) favors the petitioners' position rather than that of the respondents. In said case, the defendants made a motion for an extension of time to answer while their motion for summary judgment was pending. The Court denied the motion and directed the defendants to file their answer on the date when it became due. The writer respectfully submits that said decision is in accordance with the ruling in the *Hooven* case cited, *supra*, although the Court stated that the ruling in that case is somewhat difficult to understand.

All other cases cited by the respondents at the top of page 22 of their brief, are either Second or Ninth Circuit Court cases. No affirmative defenses were pleaded in most of those decisions and in those decisions in which they were pleaded the Courts entirely overlooked the express direction contained in Rule 8(c) of the Federal Rules of Civil Procedure that all defenses must be pleaded affirmatively.

The writer is well aware of the fact that *Halberstadt* v. *New York Life Insurance Co.*, 194 N. Y. 1, was not quoted by the District Court in connection with the procedural point discussed herein, nor has the writer referred to that case in order to show that a motion for summary judgment prior to the service of an answer is premature. The writer is well aware of the fact that the rules of a State Court

are not controlling in determining how a defense may be raised in a Federal Court. The *Halberstadt* case was cited in the petition for a writ of certiorari for the sole purpose of showing that the respondents' assertion that the termination of the prior proceedings was the result of a settlement must be pleaded as an affirmative defense. This, at least, appears from the ruling in the *Halberstadt* case and it is not necessary to rely on the *Halberstadt* case in order to prove that affirmative pleading must precede any motion for summary judgment. This conclusion follows from a proper interpretation of Rule 8(c) of the Federal Rules of Civil Procedure and the writer never intended to cite a decision of the Court of Appeals of the State of New York in order to prove said point.

POINT II

The dismissal of the contempt proceedings was a dismissal on the merits and was not the result of any compromise.

Petitioners, in their petition for the writ of certiorari, have conclusively shown that the order of dismissal (78a) was a dismissal on the merits after the Court was satisfied that good cause existed for said dismissal. The petitioners have further shown that said order is barren of any reference to a settlement or compromise, and that the respondents have failed to produce any stipulation or other writing showing the existence of any compromise or settlement. Confronted with those uncontroverted facts, the respondents seek final refuge in the fact that the plaintiff was present at the hearing on January 23, 1953, when the dismissal of the contempt proceedings was discussed before Judge McLean. Thus, the respondents are forced to attempt to support the dismissal of the cause of action for malicious prosecution on the basis of suggested inferences to be drawn from the plaintiff's conduct in court.

The inference which the respondents attempt to draw from Mrs. Seitz's conduct are completely unjustified and her conduct in Court indicated, if anything, her opposition to any settlement or compromise. That the plaintiff was utterly opposed to any settlement or compromise, and that her conduct throughout the proceeding could give rise to no possible inference of her assent to a settlement or compromise, is proven by the following facts:

1. One week after her arrest, to wit, on February 8, 1952, Mrs. Seitz applied to Judge McClean, for an immediate trial by jury (125a);

2. After Judge McClean failed to set the case down for trial Mrs. Seitz appealed to the Appellate Court and to the Supreme Court (125a and 126a);

3. Mrs. Seitz wrote several letters to Mr. Spritzer and made numerous calls to him in order to expedite the matter (82a, 126a);

4. In the letter of February 6, 1953, Mrs. Seitz strongly objected to any dismissal of the contempt charges against the defendant Isabelle Seitz;

5. A copy of said letter was sent to Mr. Spritzer, in which Mrs. Seitz clearly stated that he (Spritzer) had not jurisdiction over the defendant Isabelle Seitz, only the investigation of the plaintiff and her husband having been assigned to him (129a).

In connection with the letter of February 6, 1953, counsel for respondents complains of the fact that it was printed in the petition *in toto*, although only portions of said letter were quoted in the Court below. This complaint comes with ill grace from counsel for respondents who "indulged himself the license" of printing in his appendix as an "addendum to appendix", twenty pages consisting of letters which are no part of the instant record and which are entirely extraneous to the issues raised on the appeal.

As far as the printing of the letter is concerned, the writer was entitled to print the entire letter after both parties referred to it in the District Court, and one portion was quoted by petitioners and another portion was quoted by the respondents. Counsel for respondents endeavors to minimize the import of said letter by stating, that except for the two paragraphs which are contained in the affidavits before the District Court, it is nothing more than harangue and a criticism of matters already adjudicated. Counsel for respondents reaches this conclusion by totally ignoring Mrs. Seitz's statement that "it would neither make sense nor be fitting to dismiss * * * or rather * * * to condone a criminal contempt, twice admitted kidnapping and the desertion of the third infant * * * *". Can counsel for respondents imagine a stronger objection to the dismissal of the contempt charges against the defendant Isabelle Seitz, than that indicated by this statement?

For the sake of argument, however, the writer gladly accepts respondents' suggestion to take into consideration only those two paragraphs of said letter which were quoted in the Court below. Those paragraphs appear on pages 81a and 128a, 129a. The first paragraph, which was the sole paragraph relied upon by the respondents in the Court below, shows exactly the contrary of what the respondents intend to prove. That paragraph requests the Court to sign the order dismissing the charges against her husband and herself without making the slightest reference to any contempt charges against the defendant, Isabelle Seitz, let alone making any request for the *dismissal* of said charges against the defendant, Isabelle Seitz. The other paragraph quoted by Mrs. Helen G. Seitz in the Court below (128a and 129a) shows clearly that she was not concerned with a dismissal of the charges against her on any bargaining basis, but that she felt that if the defendant, Isabelle Seitz, were to be set free, then the contempt proceedings *against her son* must be likewise dismissed. Since it is uncontradicted

that the contempt proceedings against the son of Mrs. Helen G. Seitz were never dismissed, no compromise was ever reached even if there had been an attempt by Mr. Gottschalk and respondent Romond to work out such a compromise.

It appears from the foregoing that the facts in connection with said alleged compromise are strongly controverted and that the statement made at page 25 of respondents' brief that the testimony of the respondent Romond, and Mr. Spritzer, is wholly uncontroverted is by no means supported by the record. The affidavit of Mrs. Seitz controverts each and every statement contained in the affidavits of the defendant, Romond, and Mr. Spritzer (122a-131a).

In this connection the writer again desires to call this Honorable Court's attention to pages 3 to 19 of the respondents' brief in which counsel for the respondents has set forth his version of the facts under two headings, to wit: "UNCONTROVERTED FACTS" and "CONTROVERTED FACTS". The presentation of the uncontroverted facts covers fourteen pages, while the presentation of the controverted facts covers only three pages. Counsel for the respondents has arrived at this surprising result by omitting from his statement of the controverted facts practically all of the facts which are controverted and which are most material in the instant proceeding.

It is interesting to note that, of the eight paragraphs enumerated under the heading of "Controverted Facts", seven paragraphs deal with the prior proceedings and only one, to wit, the eighth paragraph, deals with the alleged abduction of the infant plaintiff. With this incident counsel for the respondents closes his presentation of the controverted facts and entirely fails to present all those controverted facts relating to the arrest of the adult petitioner herein, the institution of the contempt proceedings, and, particularly, the termination of said contempt proceedings

in favor of said petitioner. Those additional controverted facts, which are most material in connection with the instant proceeding, are as follows:

(a) The respondents contend that the infant petitioner was kidnapped by his father and paternal grandfather. This is strenuously contested by the petitioners who contend that on January 5, 1952, the father of the infant petitioner, by authority of the right of visitation given to him by Court order, again attempted to see his youngest child and when he approached the house of the respondent Hayes the infant petitioner suddenly ran down from the porch of the house and jumped into his father's car and pleaded for sanctuary. In any event, the facts are undisputed that the petitioner Seitz was not in the car and was not present at the time of the alleged abduction and that therefore there was not the slightest probable cause for the arrest of the petitioner Seitz.

(b) The respondents contend that in any event the infant petitioner was *removed* by his father and grandfather. This is strenuously controverted by the petitioners, who contend that the mental and physical condition of the infant petitioner in January, 1952, was such that the father of said infant petitioner was duty bound to take him to doctors and psychiatrists for examination and help and that said doctors and psychiatrists advised the father never to permit the infant petitioner to be returned to the home of the respondents Seitz and Hayes at Allenhurst, New Jersey. However, whether the infant petitioner was removed or not, the fact is undisputed that the adult petitioner had nothing at all to do with said removal and therefore the conclusion is inescapable that the arrest of the adult petitioner was without probable cause.

(c) The respondents contend that the infant petitioner was harbored in the home of the adult petitioner. This is strongly contested by petitioners and the evidence shows

clearly that the infant petitioner was never in the possession of the adult petitioner who stated before Judge McClean, on January 22, 1952, as follows:

> "The child is not in my possession, has not been in my possession; he is living in quarters of his father's. The doors are locked. There is only a temporary passage between our house and his. He is taking care of the child. I have supplied the food, if that can be called an offense" (64a).

It appears clearly from said statement that the so-called harboring of the boy by the adult petitioner is strongly disputed by the petitioners and that, as a matter of fact, the boy was never in the possession of the adult petitioner.

(d) The respondents contend that the petition of the respondent Seitz to punish the adult petitioner, her husband and her son for contempt of Court, was made in good faith and with probable cause. This, too, is strenuously contested by the peitioners, who contend that said petition was made in bad faith and without probable cause and was an attempt on the part of the respondents to force the father of the infant petitioner to return said infant in order to protect his parents from further legal action.

(e) The respondents contend that in any event they are not responsible for the arrest of the adult petitioner since the petition of the respondent Seitz did not ask directly for the arrest of the adult petitioner but merely that she be held in criminal contempt and that the respondent Romond had endeavored to dissuade the judge from issuing an order of arrest. This, too, is strongly contested by petitioners, who contend that all of the respondents are responsible for the arrest, which was a direct result of said petition, and that in any event the record is barren of any proof that the respondent Romond had endeavored to prevent the issuance of an arrest warrant.

(f) The respondents contend that the respondent Hayes is not responsible for said petition since the petition was not signed by her. The petitioners contend that the respondent Hayes had instigated the entire proceedings against the Seitz family and that she had retained and paid the respondent Toolan in connection therewith.

(g) The respondents Toolan and Romond contend that they are not liable for the arrest of the adult petitioner since they acted only as attorneys, whereas it is the contention of the petitioners that the contempt petition was signed by them, was made by them without probable cause, and that they are liable for the arrest of the adult petitioner since they participated in all of the steps which led to her arrest.

(h) The respondents contend that even if the contempt petition were made without probable cause, the adult petitioner cannot recover since the prior proceedings were terminated by a compromise. This is most strenuously contested by the adult petitioner, who was not a party to any compromise and who was never represented by any attorney in connection with the prior proceedings. In this connection it is undisputed that Walter Gottschalk, Esq., who appeared as attorney for the father of the infant petitioner, had never represented the adult petitioner, and it is therefore immaterial whether a mutual dismissal of the contempt proceedings against the adult petitioner and the contempt proceedings against the respondent Seitz was suggested by said attorney or by anybody else, insofar as the adult petitioner is concerned.

(i) The respondents further contend that the adult petitioner has at least "assented" to the dismissal of the prior proceedings against her. Aside from the fact that such an assent does not constitute a compromise, the adult petitioner did not assent to the dismissal of the prior proceedings. Except for the gratuitous and unsupported state-

ment of Morris Spritzer, prosecutor in said contempt proceeding, there is not a scintilla of proof that the adult petitioner consented to the dismissal of the prior contempt proceedings against her. The respondents have not submitted the minutes of the hearing of January 23, 1953, and have therefore failed to prove what occurred thereat and, consequently, even if the adult petitioner were silent at that hearing, no inference could be drawn as to the reason for such silence, in view of her constant opposition to any disposition by way of settlement. On the contrary, the letter written by the adult petitioner to Judge McClean, a copy of which was sent to Mr. Spritzer and which appears in full at pages 19 to 24 of the petition for a writ of certiorari, indicates that the adult petitioner strongly objected to the dismissal of the contempt proceedings against the respondent Seitz, which dismissal, according to the contention of the respondents, was the *quid pro quo* for the dismissal of the contempt proceedings against the adult petitioner. Since said letter conclusively shows that the adult petitioner had categorically refused to accept such "bargain" whereby both contempt proceedings were to be dismissed, there cannot be any compromise nor any "assent" which could deprive the adult petitioner of her cause of action for false arrest and malicious prosecution.

These are the most important of the numerous controverted facts which are highly material in the instant proceeding and which have been omitted in the presentation of the respondents' "Controverted Facts" in order to make it appear that there are no issues of fact in the instant proceeding and that the granting of the motion for summary judgment was proper. Moreover, it is the contention of the writer that even if there had been an assent by the adult petitioner to the dismissal of the prior proceedings against her, said assent would not deprive the adult petitioner of her cause of action for false arrest and malicious prosecution, since such an assent does not con-

stitute a compromise. As the writer has pointed out in his main brief, every defendant in a criminal proceeding—no matter how innocent—readily assents to the dismissal of said proceedings and can hardly be expected to object to said dismissal. In order to prove his rather surprising point, counsel for the respondents, at page 30, of his brief, cites two Massachusetts cases in which the Courts have held that the *nolle prosse* of a criminal proceeding does not constitute a favorable determination of said proceedings. However, counsel for the respondents fails to state that said decisions were in accordance with the constant rulings of the Massachusetts Courts that only an acquittal and not a *nolle prosse* constitutes a favorable determination of the criminal proceedings. *MacLean* v. *Namkeag*, 167 N. E. 74; *Fogg* v. *First National Bank*, 167 N. E. 251. Said Massachusetts ruling is not followed in any other jurisdiction and is definitely not the law in the Third Circuit or in any other circuit. To that effect see: *French* v. *United States Fidelity & Guaranty Co.*, 88 F. Supp. 714, where Judge Forman, at page 721, stated as follows:

> "Detention is unnecessary, however, where the prosecution is criminal, Hammill v. Mack International Motor Truck Corp., et al., supra, 104 N. J. L. at page 553, 141 A. 775. The withdrawal of the complaint, Hammill v. Mack International Truck Corp., et al., supra, 104 N. J. L. at page 553, 141 A. 775, or the judgment of acquittal or nolle pro se qui, Apgar v. Woolston, 43 N. J. L. 57, 64; Stein v. Schmitz, 137 N. J. L. 725, 727, 61 A. 2d 260, terminates a criminal prosecution."

POINT III

The question of "probable cause" was one for determination by a jury.

The respondents, under Point III of their brief, argue that the facts in connection with the alleged kidnapping of the infant plaintiff are not controverted and that, therefore, the question of probable cause is one of law to be determined by the Court.

It has been shown, under Point II of this memorandum, that the respondents, in their presentation of their controverted facts, have omitted all of the controverted incidents which occurred after the alleged kidnapping of the infant plaintiff. However, it is interesting to note that said alleged kidnapping itself is even presented as a controverted fact by the respondents (Item 8 of Controverted Facts). The respondents expressly refer to the plaintiff's statement that the infant plaintiff ran into his father's automobile and begged to be taken away. The respondents in their argument under Point III, have apparently forgotten that even under their version of the controverted facts, the alleged abduction of the infant plaintiff was included in this category. Since the said alleged abduction is the sole basis for the institution of the contempt proceedings against this plaintiff, it is difficult to understand how the respondents can even assert that the facts upon which the question of probable cause depends are uncontroverted. Since the facts surrounding said alleged abduction are admittedly controverted, the question of probable cause cannot be one of law but must be one of fact for the jury.

Assuming without conceding, however, that the plaintiff's son had abducted the infant plaintiff, the petition to punish the plaintiff for contempt (69a-72a) is barren of any facts connecting the plaintiff with said abduction. Said

petition does not allege that the plaintiff was in the automobile which drove up in front of the house of the defendant Isabelle Seitz. There is not one single fact in said petition to connect the plaintiff with said alleged abduction except that the petition contains the conclusory statement that the defendant Isabelle Seitz "verily believed" that Arthur M. Seitz, Sr., and the plaintiff conspired, with their son, to violate a certain custody order.

The fact that the plaintiff had supplied food to the infant plaintiff cannot furnish any probable cause for said petition inasmuch as the respondents had no knowledge of these facts until, at the hearing, the plaintiff frankly admitted having supplied food for her grandson. Moreover, in the petition for a writ of certiorari, is it clearly shown, that the supplying of food to a child of tender age can, under no circumstances, constitute contempt of court. Do the respondents seriously argue that a grandmother should let her grandson starve because his parents are at odds with respect to his custody? Since the abduction itself is controverted, and since no facts have been shown to connect the plaintiff with said abduction, the question of probable cause was at least one for the jury.

Both cases cited by the respondents, at page 32 of their brief—*Shoemaker* v. *Shoemaker*, 11 N. J. Super. 471, and *Vladar* v. *Klopman*, 89 N. J. L. 575—are not in point since in these cases the facts upon which the question of probable cause depended were not controverted.

On the other hand, the eight cases cited by petitioners at pages 28 and 29 of their main petition are directly in point since in those cases, as in the instant case, there were disputed facts involving the question of probable cause. The respondents admit that the Courts, in *Daniel* v. *Pappas* (16 F. [2d] 880); *Boland* v. *Ballaine* (266 F. 22); *Pence* v. *Melvin* (38 F. Supp. 759) and *Good Holding Co.* v. *Boswell* (173 F. [2d] 395, cert. den. 70 S. Ct. 55, 338 U. S. 815, 94

L. Ed. 493), have held that disputed questions of probable cause must be submitted to the jury.

The attempt made by the respondents to distinguish the cases of *North British & Mercantile Insurance Co.* v. *Feldman* (149 F. [2d] 523), and *Bucher* v. *Krause* (200 F. [2d] 576), upon the ground that there had been an arrest without a warrant, must fail since the question of probable cause cannot be treated differently in a case where a warrant had been issued.

Insofar as the cases of *Jillson* v. *Caprio* (181 F. [2d] 523) and *Bucher* v. *Krause*, cited *supra*, are concerned, the respondents emphasize that those cases concern only actions for malicious prosecution, apparently overlooking, as the District Court did on occasion, that the instant complaint contains a separate cause of action for false arrest.

Insofar as the last case cited by petitioners in their petition is concerned, to wit, *Seaboard Oil Co.* v. *Cunningham*, 51 F. (2d) 321, the respondents are of the opinion that that case gives respondents no sustenance and is in fact authority in their favor. They reach this conclusion by citing only that portion of the case in which it is stated that, in a clear case *on undisputed facts*, probable cause is a question of law for the Court. However, they have failed to cite that portion of the case which is directly in petitioner's favor and which reads as follows (p. 325):

> "But where the evidence is in substantial conflict or reasonable men may draw different conclusions from it, probable cause is a question for the jury."

It has been conclusively shown that the evidence in the instant case is in substantial conflict as to all elements of an action for malicious prosecution and false arrest. There cannot be the slightest doubt that reasonable men may draw different conclusions from the evidence.

POINT IV

The warrant of arrest issued by Judge McClean was without authority in law.

The District Court upheld the validity of the order of arrest solely on the basis of the New Jersey Rule 2:8-2(a). The respondents have entirely failed to meet the petitioners' argument to the effect that the said rule only authorized the issuance of the order of arrest as one of the means of giving notice of the institution of contempt proceedings.

Since it is uncontroverted that the instant contempt proceedings had been instituted by order to show cause, and since it is further uncontroverted that the plaintiff appeared voluntarily on the return day of said order to show cause, the Superior Court was without any authority in law to issue an order of arrest. The importance of this point is best proven by the fact that, although the respondents have endeavored to refute every point raised by the appellants in their main brief, there is only dead silence in their brief with respect to this decisive point.

It cannot be too strongly emphasized that the order of arrest as referred to in the New Jersey rule, above mentioned, is only one form in which notice of such contempt proceedings may be given. The rule itself expressly so states. Since the plaintiff had been given notice by an order to show cause, the giving of a second notice by order of arrest was entirely unfounded and unwarranted. As a matter of fact, Judge McClean did not issue said order of arrest in order to give the plaintiff notice of the proceedings; he did it because he had reached the conclusion that the plaintiff had committed a criminal contempt and endeavored to punish her therefor. Said conclusion was reached without a trial on the issues and, therefore, amounted to a conviction of the plaintiff without a trial.

This is practically admitted by the respondents at page 34 of their brief.

The respondents repeatedly emphasize that the order of arrest and the warrant issued thereunder were regular on their face. However, the question is not whether the order of arrest and warrant itself complied with technical requirements but whether there was any legal basis for their issuance.

POINT V

All of the appellees are responsible for the false arrest of the plaintiff.

The petitioners, at page 32 of their petition, have cited several cases for the proposition that persons promoting certain proceedings and setting the forces in motion are not protected from the consequences of their acts and from liability for malicious prosecution and false arrest by hiding behind the robes of the Judge. This is exactly what the respondents now endeavor to do. Their argument is replete with tearful protestations that they did not want the plaintiff arrested but that it was the doing of the Judge alone. In this connection they refer to pages 62a, 63a and 65a. However, there is not a single statement cited by the respondent Romond indicating that he had endeavored to dissuade the Court from the issuance of a warrant of arrest. The respondents merely assert that the respondent Romond had dissuaded the Court from issuing a writ of habeas corpus, and even that is not borne out by the record.

Assuming, without conceding, however, that the order of arrest had been issued by Judge McLean on his own motion, nevertheless the respondents are still responsible for said arrest, first because they had instituted the instant contempt proceedings without any basis therefor, and had asked the Court to find the plaintiff guilty of a criminal

contempt and to deal with her accordingly (72a) and, second, because the order of arrest was prepared by the respondent Romond (65a) and said respondent acted together with the respondent Toolan, as attorneys for the respondents Hayes and Seitz.

None of the cases cited by the respondents under Point IV of their brief is in point. In *Schneider* v. *Kessler*, 97 F. (2d) 542, the validity of the order of arrest itself was not involved but the main question involved in that case was whether the person arrested was identical with the person named in the order of arrest. That issue, of course, is entirely foreign to the issues of the instant case.

The most recent case decided by the Superior Court of New Jersey, cited by the appellees, is *Earl* v. *Winne*, 14 N. J. 119, which case contains a full discussion of all of the aspects of an action for malicious prosecution, false imprisonment and abuse of process. This case is definitely in favor of the petitioners. In that case the Superior Court, at page 133, stated as follows:

> "The distinction established by the cases is that where the affiant states the fact truly and the judicial officer thereupon does an act which the law may not justify, the affiant is not liable because in that case the grievances complained of arose from a mistake of the Judge and no wrongful act of the affiant. *But where the affiant falsely and maliciously states facts untruly and procures a warrant to be issued, he becomes responsible for the prosecution and arrest because if he had not made the false affidavit and asked for the issue of said warrant, the Court could not and would not have decided that criminal process should issue*" (emphasis writer's).

This language directly applies to the facts of the instant case.

Judge McClean would not have issued an order of arrest if the respondents had not instituted a petition to punish the plaintiff, her husband and her son for contempt. However, the allegation in said petition that the plaintiff herein had conspired with her son and her husband to violate a certain custody order is entirely false and is even not supported by any factual allegation in said petition.

Whether at the time that said petition was made probable cause existed against the plaintiff's son, or even against the plaintiff's husband, is entirely immaterial since no facts whatsoever were alleged to show that the plaintiff participated in said alleged abduction of the infant plaintiff. As a matter of fact, even the respondents did not allege that the plaintiff was in the automobile in which the alleged abduction took place.

Schneider v. *Kessler*, cited *supra*, and *Bierwith* v. *Piersonnet*, 65 Missouri Appeals 431, are not in point since the plaintiff was not arrested pursuant to a valid and lawful process, but was arrested on the basis of an order of arrest for which no legal authority could be shown.

The cases of *Percival* v. *Jones*, 2 Johns. Cases 49, and *Kendel* v. *Guterl*, 84 N. J. L. 533, are not in point because in those cases the warrant of arrest was issued in criminal cases, in which a judge may, on rare occasions, issue a warrant of arrest against the wish of the complainant. In those cases, however, the warrant of arrest is prepared by the Court, without the aid of the attorney, while in the instant case the order of arrest was concededly prepared by the respondent Romond. Moreover, it has been heretofore shown that the gratuitous statement made in the respondents' brief that the respondent Romond endeavored to dissuade the Court from the issuance of said warrant of arrest is not supported by the record.

In addition to the cases cited by the petitioners in their petition the writer wishes to call this Honorable Court's

attention to the case of *Director General of Railroad* v. *Kastenbaum*, 44 Sup. Ct. 52, 263 U. S. 25, wherein the Supreme Court, at page 53, stated as follows:

> "The action for false imprisonment is in the nature of a trespass for a wrong or illegal act in which the defendant must have personally participated directly or by indirect procurement. The gist of it is an unlawful detention, and that being shown, burden is on the defendant to establish probable cause for the arrest."

It is clear from all of the facts submitted in the instant case that all of the respondents had at least indirectly procured the warrant of arrest upon an invalid order, by which the plaintiff was arrested under the most humiliating and disgraceful circumstances.

POINT VI

The causes of action of both plaintiffs for conspiracy are sufficient in law.

Inasmuch as the respondents in their brief add very little to the opinion of Chief Judge Forman, which opinion was fully discussed in the petition for a writ of certiorari, there is no need to reply at length to the respondents' brief in this connection.

The writer agrees with Chief Judge Forman that the conspiracy cause of action in the plaintiff's complaint, insofar as it relates to malicious prosecution, false imprisonment and abuse of process, must stand or fall with the first three substantive causes of action. Since it has been shown in the petition for a writ of certiorari, that the plaintiff has good and valid causes for malicious prosecution, false imprisonment and abuse of process, the conspiracy count in that connection should, likewise, not have been dismissed. The respondents, however, go further than

Chief Judge Forman and state that the conspiracy cause of action is insufficient since no agreement or understanding between the respondents to commit the wrongs was proven in the District Court. In this connection it is sufficient to again refer to the *French* case, cited *supra*, in which Chief Judge Forman held, under very similar circumstances, that the conspiracy count constituted a good cause of action.

Insofar as the one year statute of limitations is concerned, the respondents have entirely failed to meet the appellants' argument as presented at pages 34 to 36 of the petition for writ of certiorari. The writer has there shown that the plaintiff's conspiracy cause of action includes not only a conspiracy to defame her but also to oppress and ruin her mentally, physically and socially. The one year statute of limitations is only applicable to a cause of action for defamation and can therefore, under no circumstances, apply to said conspiracy count.

The writer has also shown that any statute of limitations starts running from the last overt act alleged in the conspiracy count, and that, therefore, no part of said conspiracy can be barred by the statute of limitations.

Insofar as the infant plaintiff's conspiracy cause of action is concerned, the petitioners fully rely on the authorities cited under Point VI of their petition for a writ of certiorari.

CONCLUSION

In conclusion it is respectfully submitted that this Honorable Court issue a writ to review the judgment of the Court of Appeals.

Respectfully submitted,

ARCHIBALD PALMER,
Attorney for Petitioners.

FILED
NOV 2 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 119

HELEN G. SEITZ and ARTHUR MACGREGOR SEITZ, III, an infant, under the age of fourteen years, by WILLIAM H. TALLYN, as Guardian ad Litem,
Petitioners,

vs.

JOHN E. TOOLAN, ISABEL HAYES, HUYLER E. ROMOND and ISABELLE S. SEITZ,
Respondents.

PETITION FOR RE-HEARING OF PETITION FOR WRIT OF CERTIORARI

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JOHN E. TOOLAN, ISABEL HAYES, HUYLER E. ROMOND and ISABELLE S. SEITZ,

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PETITION FOR RE-HEARING OF PETITION FOR WRIT OF CERTIORARI

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

This petition of Helen G. Seitz as Attorney Pro Se respectfully shows to this Court and alleges:

1. That since my counsel Archibald Palmer for whom I have the highest esteem and I are not in agreement as to the justification for a petition for re-hearing of the Petition for Writ of Certiorari, I am herewith presently,—because the welfare and safety of human lives not material or financial values are endangered, and because of lack of time,—very

respectfully forced to present and humbly petition the Highest Court in the Land for a rehearing on the Writ of Certiorari, which petition was denied on October 8, 1956.

2. Circumstances,—similar to those presented by me to the Honorable Judge Forman in my Motion protesting at opposing attorneys being granted an extension of 2½ months time following service made upon them of my Complaint 1046-53 and as stated to him in open Court, I appeared as attorney Pro Se only because it was impossible to secure any New Jersey attorney to represent the Infant Plaintiff and myself because, as Mr. Richard Moser, former counsel to the United States Senate Crime Investigating Committee who represented me at the hearing before the Board of Bar Examiners in 1952, reported in his Memorandum to the New Jersey Supreme Court, that when Mr. Toolan was exposed of deliberately perpetrated fraud and/or of having submitted deliberately prepared (214-224 Bar Exam. Transcript) false affidavits, one even signed by him, to the Courts throughout the eight years of Seitz litigation, he attempted to assault Mr. Moser, counsel for the Complainants, "in open Court and was only prevented from so doing by the forcible intervention of his own counsel",—make it impossible for me to do other than appear, despite my reluctance, once more as Attorney Pro Se to plead that the Honorable Justices of the United States Supreme Court grant a rehearing on the Petition for Writ of Certiorari. Despite Mr. Palmer's belief that such a petition will be useless, I have the same former respect and friendship for my counsel and only regret that he cannot share my point of view in this particular instance.

3. That this request for rehearing is made by me because of the belief that the Highest Court in the Land is entitled to be presented with all the material facts pertinent to the case so far as possible within the restrictions imposed by Rule 58, subdivision 2, to enable the Court to arrive at a just conclusion. This was stressed and ruled by Mr. Justice Jacobs at the time Mr. Toolan attempted to perpetrate fraud upon Panel "A" Justices Bigelow, Eastwood and Mr. Justice Jacobs in an attempt to force these Justices to make a false decision in his favor. (Bar Examiner Transcript. page 224 on) (Vol I, starting page 1, Appen. to Appel. Brief Below Burton)

4. I wish to emphasize that Civil Action 1046-53 is no part of Custody Action, *Seitz* v. *Seitz*, M5004-50/161-660 which is still pending in New Jersey Superior Court by order of Judge McLean (Transcript Feb. 23, 1953); that as Mr. Toolan stated in his affidavit of March 1948 which was also stressed by Judge McLean later, I was never a party to either the petition to the Juvenile and Domestic Relations Court by the father of the Seitz children to prevent the divorce which it was evident his mother-in-law, Isabelle Hayes, was intending to bring about in December 1947, which petition was never heard by Judge Smith because, as Mr. Toolan admitted in his affidavit presented to advisory master Rogers on March 9, 1948, "he had prevailed upon Judge Smith" not to hear the petition to prevent divorce, because he, John Toolan, was immediately filing a petition for divorce for his client, Mrs. Hayes' daughter; nor was I a party to the affidavit custody motion brought by Mr. Toolan in March 1948 which fact he stresses in his affidavit; nor was I ever a party to any of the *Seitz*

v. *Seitz* custody actions brought by the father from June 25, 1948 until the time of my false arrest in February 1952 although Civil Action 1046–53 was the direct outgrowth thereof because Mr. Toolan et als., diverted every custody action brought by the father into a malicious prosecution of me in order to prevent the exposure that Mr. Toolan, Mr. Romond and Mrs. Hayes, the maternal grandmother of the infant Seitz children, had entered into a conspiracy in *March 1948* to concoct false, maliciously slanderous affidavits composed of excerpts from letters *of 1942*, annotated to follow the theme of a vicious scurrilous anonymous letter—handwritten—received by me *in 1942*, six years before, of which, in the belief that the original handwritten letter had long since been destroyed, they attached a typewritten copy to the "companion affidavits" signed by Mrs. Hayes and John E. Toolan, purporting this typewritten copy to be the original anonymous letter and falsely attributing the authorship to me for the purpose of blackmail and extortion and submitting these false and malicious, libelous affidavits at an affidavit hearing to Advisory Master Rogers together with other false and/or misrepresenting affidavits under the guise of the "companion affidavits" (laboriously prepared to blacken my character and defame me) having been presented to substantiate the competency of Mrs. Hayes' daughter, who, as her own affidavit and later testimony in the Court transcripts shows, had deserted her husband's home and her two oldest children the year before at the instigation of Mr. Toolan. (Concocted affidavits in conspiracy by Toolan, Romond and Mrs. Hayes: Bar Examiner page 214 et seq.; "companion affidavits of Toolan and Hayes and Isabel Seitz in Defendant-Respondent's Brief sat below J. McLean; Anonymous

letter in Volume III of Appen. to Appel. Brief sat below Burton Exhibit B-D-14) Neither Mr. Toolan's nor Mrs. Hayes' affidavits in anyway made even the pretense of substantiating Isabel Seitz' assertions that she was capable and competent to rear and care for her children, nor did Mr. Toolan attach any of the letters from which false excerpts had been taken to substantiate the excerpts and annotations of which the affidavits themselves were composed. (Bar Exam. Trans. pages 222, also pages 206-207 testimony of Mr. Toolan)

5. As partly shown by the foregoing, the entire Seitz litigation is based upon premeditated perjury and fraud perpetrated upon the New Jersey Courts by John T. Toolan et als. and now continued in the Federal Courts by John E. Toolan who boasted on December 12, 1947 "that he could put his thumb on almost any judge in the State of New Jersey" and brazenly proving his statement on that very day and openly stating under oath "that he had prevailed upon Judge Smith" (not to fulfill his obligations as a Domestic Relations Court Judge to prevent divorce if possible where there were children).

6. In the same fashion as that employed by John E. Toolan throughout eight years of litigation Mr. Ruback, Mr. Toolan's attorney, endeavors to mislead the Supreme Court of the United States Justices by presenting a version of this Civil Action 1046-53 which is foreign to the truth. He resorts to concealment, half-truths and deliberate misrepresentation in his efforts to protect his clients, particularly John E. Toolan whose professional reputation is at stake. The record shows that Mr. Ruback and Mr. Toolan have resorted to trickery, fraud and false affidavits, not

once but constantly as a comparison of their affidavits presented to Judge Forman, the U. S. Circuit Court of Appeal and presently the Supreme Court shows. Toolan has resorted to deliberate disregard for Rules of Law in the State Courts as his own testimony and admissions made before the Board of Bar Examiners in 1952 shows: (page 222 et seq. Bar Examiner Trans.):

> Mr. Toolan: I know that Rule of Law and I also know the way to change the law is to do the things the Court says is not the law.

and this same disregard for law is evidenced by his utter disregard for the Rules of Law governing Interstate Litigation by his insistence in usurping a caption and docket number assigned to and paid for by a Florida resident, and using same to prosecute a libel action based on fraudulent presentations to Judge Forman, in the State of New Jersey, he knowing full well that legally and according to Rules governing interstate litigation, he must prosecute his libel action against a Florida resident in the State of Florida. Mr. Toolan and Mr. Ruback are fully aware that they are thereby establishing a precedent which will permit any person against whom an action is brought for "wrong-doing", crime or other illegal acts to interject a "flimsy" or fraudulent counterclaim into a legitimately filed Complaint and thereby maliciously secure the dismissal of the true complaint and, despite his own deposition showing the fraud perpetrated in the interjected counterclaim, secure a decision in his favor without due process of law. Mr. Ruback too, shows his disregard for the Laws set forth in the Constitution of the United States, by violating my Constitutional Right to privacy, against unreasonable searches, forcing a "confession"

regarding my private affairs and wilfully damaging and destroying my character and reputation to prejudice Judge Forman against me and my cause, (Deposition of Jan. 25, 1956 and transcript of hearing of December 5th, 1955) and publishing said libelous statements after having uttered them before witnesses in open Court without reason and in the full knowledge that he was making malicious and atrocious slanderous statements. Mr. Ruback not only conspired with Mr. Toolan in the manufacture of the interjected libel, but aided and abetted him in violating the Rules of Law governing interstate litigation and thereafter making a mockery of the carefully designed and established procedure of vital interest to all the States in the Union.

7. Among the many *deliberate* misrepresentations in Mr. Ruback's Briefs probably second in importance to the deliberate introduction of the vague and misleading Vanderbilt Order affirming a "definitely contrary to the facts" produced in the transcripts of the Hearings Report of supposedly the full five member Board of Bar Examiners (due to disagreement among the members reduced to but three), is the oft repeated (first to Judge Forman, then to the U. S. Circuit Court of Appeal, and now to the Supreme Court of the United States) implication that the Panel of Justices of the New Jersey Appellate Court which *reversed* Judge McLean on the first Appeal and the Panel which *affirmed* Advisory Master Burton on the Second Appeal were identical—which is untrue.

8. One of these many instances is shown in Mr. Ruback's Brief for Defendants-Appellees in the

United States Circuit Court for Appeals. On page 8 referring to Judge McLean he states:

> "This judgment was reversed by the Appellate Division of the Superior Court of New Jersey * * *"

and on page 9 referring to Advisory Master Burton he states:

> "That judgment was *unanimously* affirmed by the Appellate Division of the New Jersey Superior Court * * *".

It is noteworthy that Mr. Ruback carefully omits the word *"unanimously"* when referring to the reversal of Judge McLean.

From the language above quoted one would gather that the *same* "Appellate Court" Justices had functioned in *both* outstanding "Appellate Court" decisions and had reversed its first decision in the *Seitz* v. *Seitz* case, which was entirely untrue. Had this been the case the Seitz family would not have continued to expend a fortune in New Jersey litigation.

The First Appellate Division of the New Jersey Superior Court was then known as *Panel "A"* composed of Justices Bigelow, Eastwood and Jacobs, Mr. Justice Bigelow writing the Unanimous Opinion reversing Judge McLean, and the second Appellate Court was then known as Panel "B" of which Mr. Colie wrote the Opinion confirming the challenged Burton Opinion (written without the transcript having been available to him or the attorneys Moore and LaPorta until months after Mr. Burton had published an Opinion contrary to the proofs produced in the Record) Mr. Colie confirming the Burton fraudulent Opinion without Mr. Colie having compared the chal-

lenged Burton Opinion "with the facts in the Record". Opposing attorneys, especially Mr. Ruback, have stated that I have stigmatized the Judge Burton Opinion as false and infamous, and I petition the Honorable Supreme Court Justices to compare the slanderous representations in Mr. Burton's Opinion with the Transcripts of the Burton rehearing and judge for themselves whether I have been guilty of misrepresenting his Opinion. The testimony of the three psychiatrists alone (Mr. Toolan's hired Dr. Flicker included) omitted entirely by Mr. Burton, as was the really remarkable testimony of the custodian who thought nothing of pilfering personal articles belonging to a witness on the stand and, believing them of value to her side, handing them to Mr. Toolan, who interrupted the examination of the witness to put the pilfered articles into evidence, only to immediately call a recess in order to attempt to get them out again; who in her planned attempt to blacken her children's father as a blackmailer, exposed the fact under oath that she, not he, had been the actual blackmailer and very definitely proved that she thought nothing at all of committing perjury on the stand; also omitted by Mr. Burton was the fact, as the record shows, that Mr. Toolan and Isabelle Hayes, the maternal grandmother had been guilty of perpetrating the same fraud upon Mr. Burton as they had perpetrated upon advisory master Rogers on March 9, 1948—which same fraud Mr. Toolan and Mr. Romond had attempted *unsuccessfully* to perpetrate upon Panel "A" of the Appellate Court as Mr. Toolan's testimony before the Bar discloses (Bar Exam. Transcript 219 et seq.) and to make comparison of Mr. Burton's challenged opinion with the Court transcripts easy, set forth in Volume I, appear the Panel

"A" Unanimous decision, the Burton Opinion followed by the Transcript of the Burton re-hearing and continuing in Volumes II and III of the Appen. to Appel. Brief sat below Burton. An examination of the Burton Opinion and Mr. Toolan's Brief to the Appellate Court on Appeal, which strangely was not Panel "A" who had made an exhaustive investigation prior to arriving at *their* Unanimous Opinion and were thoroughly familiar with the case and the criminalities to be expected on the part of Mr. Toolan, but a new Panel "B" which resulted in the erroneous affirmation of the Burton Opinion by this Panel "B", entirely brought into being by the false presentations to them in the Burton Opinion and the Brief of Mr. Toolan both so skilfully and convincingly contrived that, even knowing the facts, one is led into believing the lies and fraud they perpetrated, causing the honorable Justices of Panel "B" to affirm the Burton Opinion, being convinced, as was Judge Forman, of the integrity of Mr. Burton and Mr. Toolan, without comparing the challenged Burton Opinion with the facts in the Record, Mr. Colie merely curtly stating: "It will serve no useful purpose to review the facts in the Record," said Opinion having been written on December 21, 1949, at the height of the Christmas Season and during the year end rush to clear the calendar as far as possible during the first years' operation of the New Court structure, the Appeal having been made on December 12, 1949, 9 days prior thereto.

9. Mr. Palmer's presentation to the Honorable Supreme Court showed that the amended Complaint on behalf of Plaintiff Helen G. Seitz contained four causes of action. That these causes of action were:

(1) for malicious prosecution;

(2) for false imprisonment;

(3) for abuse of process;

(4) for conspiracy to commit various torts,

among them the torts referred to in the first three causes of action.

10. A summary of the first cause of action of said amended Complaint is as follows:

That the defendants Toolan and Romond are members of the Bar of the state of New Jersey and the defendant Isabelle Hayes is the maternal grandmother of the Seitz children; that, as Mr. Toolan's testimony before the Board of Bar Examiners shows during Mr. Toolan's examination by Attorney Richard Moser, former counsel for the Kefauver U. S. Senate Crime Investigating Committee, Mrs. Hayes (while her daughter was living happily in a home of her own with her husband and three infant children, separate and apart from the Seitz Sr. residence on the lovely Bernardsville estate, which, since there were no other heirs would one day be her own) arrived at his office carrying a shoe box containing *1942*, 6 year old letters written mostly prior to the birth of any of the children, and an also 1942 anonymous letter received by the paternal grandmother (Bar Examiner Transcript page 203). Mr. Toolan testified to the effect he glanced thru the letters and discovered what he felt might be a "proposition" (Bar. Ex. Page 206-07) and that thereafter he and Mr. Romond, and presumably Mrs. Hayes, prepared (conspired) "Companion affidavits" composed mostly of deleted excerpts from the 1942 letters, annotating same to follow the theme (regardless of the contents of the letters themselves showing they were written

for entirely different reasons) of the vicious (according to Mr. Brogan's statements before the Bar Examiners bristling with racial hatreds and religious bias, scurrilous anonymous letter, depicting in opprobrious language the background of Mrs. Hayes' daughter, Mrs. Hayes and particularly the first husband of Mrs. Hayes and the premarriage reputation of the Seitz' new daughter-in-law. The anonymous letter had arrived about 10 days after the marriage of Mrs. Hayes' daughter and the only heir of the Seitz family, Arthur M. Seitz Jr.

In March 1948, six years after the arrival of the anonymous *handwritten* letter Mr. Toolan, Romond and Mrs. Hayes attached a *typewritten* copy of the original handwritten anonymous letter (under the impression that the original handwritten letter had been destroyed) to the concocted affidavits, one of which was signed by Mrs. Hayes, the other by Mr. Toolan (P. 214 Bar Exam) and stated that this was the original letter and they attributed this evil thing to the paternal grandmother, Helen G. Seitz. About this time, Mr. Toolan and Mrs. Hayes prevailed upon the young wife to desert her husband's home in her mother's car. Mr. Toolan turned himself from attorney of Record into an affiant, and Mr. Romond submitted the criminally concocted documents to Advisory Master Rogers on March 9, 1948 at an affidavit hearing supposedly to substantiate the ability of Isabel Seitz, Mrs. Hayes' daughter to care for her children, but actually to obtain possession of the persons of said infant children so that they might be held as hostages in an intended blackmail and extortion plot and to so wantonly and scurrilously libel and criminally slander the children's paternal grandmother,

Helen G. Seitz, that the Seitz family would pay almost anything to prevent the matter becoming public, and to prevent any later charges and revelations made by Helen G. Seitz being believed. (Memorandum Bar Exam. to Supreme Court of N. J. dated December 6, 1952 by Richard Moser, Esq., attorney for Helen G. Seitz and the father of the children on pages 7 into 13). This was Toolan's "original sin":—that on January 14, 1952, the defendant Isabel Seitz, with the aid and assistance of her mother, Isabelle Hayes,—(THEY both being in contempt of Court for having abducted the infant plaintiff Greg and his little sister from the State of N. J. on November 9, 1951, in violation of the custody order of Judge Burton dated June 6, 1949 and the specific restraining order of Judge McLean dated August 6, 1951 as well as in contempt for having violated the father's right of visitation)—and the defendants Toolan and Romond her attorneys, maliciously and without probable cause, instituted a criminal contempt proceeding against Plaintiff Helen G. Seitz and Mr. Seitz Sr. and the father of the children, charging them with violating the very custody order they themselves were guilty of having violated since November of the year before and despite the fact that an action filed by the father was pending in the Superior Court of New Jersey since June 1951 charging the defendant Seitz with aiding and abetting the oldest boy in vicious delinquency and other serious charges.

11. that said petition to accomplish the false arrest of Helen G. Seitz and her husband was obtained and verified by Huyler E. Romond despite the fact that he was well aware that it was false and contrary to

material facts, in addition to his client being steeped in numerous contempts; that said order to show cause was never served upon Helen G. Seitz, and that Huyler E. Romond in his presentations to the Federal Courts has deliberately, as is his constant custom, misstated the facts in the Record, to Judge Forman, to the Circuit Court and presently on page 36 to the United States Supreme Court and his statements on page 34 make Judge McLean appear idiotic if Mr. Romond's brash statements were believed. The facts are: Judge McLean was well aware that Mrs. Hayes and the custodian were guilty of contempt and that no member of the Seitz family could have been guilty of contempt except under conditions existing under Nazi or Russian Rule. The child Greg was not brought by the father to the Seitz home nor to his own home in Bernardsville following the child's escape to his father (Mr. Palmer has already amply set forth the matters pertaining to our false arrests). I did not avoid service for I was in Court on the 18th, of January 1952 at which time the father and child were somewhere in the Oranges. On January 18, Judge McLean stated that "unless someone who cared enough about the child Greg removed him from his then situation and put him back on the proper path, he would produce into the worst delinquent this Country ever produced". The boy's attorney, Mr. Gottschalk was in Court and as the record shows was bluntly told by the Court that since his client was in Contempt, he Mr. Gottschalk had no standing in Court—quoting the ruling re "unclean hands"—however, Mr. Romond, whose client's contempts had brought about all the disgraceful happenings, pranced about, shouting things into the record contrary to actual happenings or testimony. The next hearing was on January 22nd

and again I appeared in Court. On this day, contrary to Mr. Romond's statement, there were present also Isabel Seitz and her mother, and although I was most respectful in my manner toward Mr. McLean, we being old friends, I spoke the truth without reserve, and I will show by the Record that Mr. Romond's presentations to the Federal Courts are false. The child Greg was taken to friends of my son's, first to Madison where he dropped his father, and then he and the child drove directly to Trenton in accordance with his conversation over the phone from Allenhurst with Dr. Spradley, who could not examine the boy until the next morning. It is necessary to point out that although the father and his attorney immediately sought the Court to report the secret return of the kidnappers and children-exposed when Greg fled to his father, the Court disqualified itself and refused to act. On January 22, and for days before that life had been made miserable for us by constant intrusions by police and officers. My home and estate had been thoroughly searched before I went to Court—no one attempted to serve me. Mr. Romond lied. He also lied in the matter of the warrants. The facts are clear, and the Record shows that Mr. Romond issued the warrants and they were all three, one for me, my husband and my son, placed before Judge McLean on the same day, January 23, 1952, Judge McLean being the only Judge presiding over our vicinage. Judge McLean refused to sign the warrant for my arrest—his unwillingness to do so was very evident on January 22. He signed the ones for my husband and my son and struck out his printed name on the one made out by Mr. Romond for me. The printed warrants as shown in the Record do not show the lines drawn by Judge

McLean thru his name on mine nor does mine show that Judge Goldman whose name appeared thereon did not sign it. I have the photostatic copy of the original verified by the Clerk of the Court. Mr. Romond's statement that of all the warrants, although submitted to Judge McLean at the same time, date and place, only mine should have been separated from the rest and given to Judge Goldman just does not make sense, and my photostatic copy and a statement made to me by Judge McLean exposes the trickery. I still claim I was falsely arrested as well as that I was falsely arrested by a "faked" warrant. I make no pretense of knowing "the Law". Mr. Palmer is regarded as one, of if not the attorney who is regarded as an expert where matters of Law are concerned.

Furthermore, since I appeared in Trenton on February 1, 1952 after having driven more than a half a hundred miles to get into Court and was not arrested until I actually was entering the Court *room,* I was not apprehended anywhere, but was falsely arrested as I was hurrying into the Court Room itself—following which, although bail for $1000 was immediately forth coming outside the door of J. McLean's Courtroom, at the instigation of Mr. Romond and the demands of Mrs. Hayes, I was refused my right to be treated as innocent until I was proven guilty and was subjected to horrible and sickening publicity, as was described by me in my appeal against my false arrest, which appeal was filed within less than a week after my false and humiliating incarceration in the Somerset jail house. I am convinced that Mr. Palmer has expertly presented the matter of my false arrest to the Supreme Court as far as his

knowledge goes. My letter to Judge McLean, an old friend to whom I felt I could speak frankly, speaks for itself. I am by nature a quiet, controlled person and I can see no reason why I should have made any comment at the time of my exoneration, especially since Mr. Gottschalk, my husband's attorney, was present.

12. There is ample evidence to show, that by reason of said unlawful and malicious prosecution and fear and uncertainty caused by the year long delay, and the re-living of the nightmare experience of being driven through town after town surrounded by State Police as though I were a just captured murderess or communist will never leave me, the long hours in the jail house, the shame and humiliation suffered by me, while those who by their disregard for law and other iniquities had brought this fearsome situation about went scot-free, still leaves a shuddering feeling that such injustice, brutality, framing of innocent people by reason of the power of a man like Toolan, discloses an exceedingly dangerous situation in our fair Land.

13. It is my understanding that Mr. Palmer has already presented the second cause of action which according to his presentations is based upon the same set of facts and in addition to the facts so set forth in the first cause, of action it is alleged that the petition made by the defendants to punish me for contempt was barren of any facts connecting said plaintiff with the alleged abduction of the Infant Plaintiff and that the Superior Court of the State of New Jersey was without authority and without jurisdiction to issue the contempt warrant against me; and that by reason of the false arrest I was deprived of my

liberty and was subjected to great humiliation and resulting illness and needless expense.

14. The third cause of action is likewise based upon the same state of facts as the first and second causes of action and, in addition thereto, it is alleged that the defendants' petition to punish me for contempt was made by the defendants for an ulterior purpose, to wit, to compel my son to return the infant plaintiff to the custody of the defendant Isabel Seitz, who had wilfully sacrificed her right of custody when *she* violated the Burton Custody Order, and that by doing so the defendants abused the processes of said Superior Court of the State of New Jersey.

15. The fourth cause of action in substance alleges that commencing in 1948 and continuing to the date of the amended Complaint the defendants entered into a common scheme and conspiracy to oppress, defame and ruin me mentally, physically and socially; to cause me to be maliciously prosecuted and falsely arrested; to abuse the processes of the Courts of the State of New Jersey, with the intent to defeat and deny the constitutional and legal Rights of this plaintiff, myself, Helen G. Seitz; in support of said conspiracy count the amended Complaint alleges various overt acts.

16. That the District Court deprived the Plaintiff of her Constitutional right to a jury trial by granting a motion for summary judgment in a case where genuine questions of law exist. That the District Court dismissed the cause of action for malicious prosecution upon the ground that the same overlooked three elements necessary to establish such a cause of

action to wit: (a) successful termination of the prior proceedings in favor of present plaintiff; (b) absence of probable cause for the institution of the prior prosecution; and (c) malice as a motive for the institution of the prior prosecution. That the District Court found that the dismissal of the Contempt proceedings against Helen G. Seitz was a part of a compromise agreement for mutual dismissal for contempt charges against adverse parties and that a dismissal which is brought about by a compromise is not a "successful termination".

17. Petitioner respectfully submits that there is nothing in the record to indicate that there was a compromise on my part and that the finding of the District Court that said plaintiff was a part of any compromise agreement is even not supported by the affidavits submitted by the defendants.

18. That the prosecutor appointed by the Court to conduct the contempt proceedings, who submitted the crucial affidavit in support of defendants' motion for summary judgment, did not state that the defendant Helen G. Seitz was a part of any compromise but that he simply inferred from her actions that she had "assented" to said settlement. Prosecutor Spritzer knew me not at all, I saw him but twice in addition to the day in Court and he was therefore incapable of truthfully "inferring" anything about me. He knew from my lips that I felt if justice was involved, the ones who were still in contempt but had brought all our heartache and tragic experiences into being should be punished and not be permitted to believe they could continue in their belief that they could commit whatever crimes they desired against others while they themselves went scot-free.

19. This Honorable Court is respectfully urged to take cognizance of the difference between a compromise and an assent to the dismissal of the prior proceedings. Petitioner does not know of any jurisdiction, other than Massachusetts, in which it was held that an assent to a nolle prosse in the prior proceeding may deprive a present plaintiff of a cause of action for malicious prosecution.

20. The district Court found that a successful termination must have an air of finality tantamount to a disposition on the merits. Petitioner respectfully submits that the termination of the prior proceedings in the instant case has had such an "air of finality", even if the plaintiff had assented to the dismissal of the prior proceedings. While it is true that a compromise is not a successful termination, a nolle prosse, even with the assent of the defendant in the prior proceeding, must be considered such final termination. That the decision of Judge Forman in the instant case is diametrically opposed to his decision in the case of *French* v. *U. S. Fidelity & Guaranty Co.*, 88 Fed. Supp. 714, in which Judge Forman expressly stated that a judgment of nolle Pro se qui constituted, under New Jersey Law, a successful termination of a criminal prosecution.

21. It is respectfully urged that the dismissal of the contempt proceedings in the instant case was in the nature of a nolle prosse and that even if the plaintiff Helen G. Seitz had assented to said nolle prosse such assent does not constitute a compromise which would deprive said termination of the air of finality.

22. That the District Court committed the same fundamental error in connection with the second nec-

essary element of a cause of action for malicious prosecution, to wit, the absence of probable cause for the institution of the prior prosecution.

23. That aside from said statement made by the plaintiff Helen G. Seitz all of the facts in connection with the so-called abduction of the infant plaintiff are controverted. The only fact that is not controverted is that the plaintiff Helen G. Seitz did not participate in the so-called abduction of the infant plaintiff. It is admitted by the defendants that said plaintiff was not in the automobile at the time of the infant plaintiff's alleged abduction.

24. That the District Court usurped the function of the jury by deciding the question of probable cause in favor of the defendants. The questions of probable cause and malice in an action for malicious prosecution and false imprisonment are questions for the jury and Judge Forman, by deciding said questions, deprived the plaintiff of her constitutional right to a jury trial. It was the province of the jury and not of the judge to decide whether the voluntary statement made by Mrs. Seitz on January 22, 1952, constituted an admission of the violation of the custody order inasmuch as it is uncontradicted that the plaintiff Helen G. Seitz did not participate in the so-called abduction of the infant plaintiff.

25. Petitioner respectfully states that it appears from all of the foregoing that the District Court invaded the province of the Jury and decided questions as a matter of law which, according to the overwhelming authority, are questions of fact which should be decided by a jury and not by the Court in connection with a motion for summary judgment.

26. One of these many instances is shown in Mr. Ruback's Brief for Defendants-Appellees in the United States Circuit Court of Appeals. On page 8 referring to Judge McLean he states:

> "This judgment was reversed by the Appellate Division of the Superior Court of New Jersey * * *"

and on page 9 referring to Judge Burton he states:

> "That judgment was unanimously affirmed by the Appellate Division of the New Jersey Superior Court * * *".

It is noteworthy that Mr. Ruback carefully omits the word *"unanimously"* when referring to the reversal of Judge McLean.

From the language above quoted one would gather that the *same* "Appellate Court" Justices had functioned in *both* outstanding "Appellate Court" decisions and had reversed its first decision in the *Seitz* v. *Seitz* case, which was entirely untrue. Had this been the case the Seitz family would not have continued to expend a fortune in New Jersey litigation. The first Appellate Division of the New Jersey Superior Court was then known as Panel "A" composed of Justices Bigelow, Eastwood and Jacobs, Mr. Bigelow writing the Unanimous Opinion reversing Judge McLean, and the second Appellate Court was then known as Panel "B" of which Mr. Colie wrote the Opinion confirming the challenged Burton Opinion (written without the transcript having been available to him) without Mr. Colie having compared the challenged Burton Opinion "with the facts in the Record".

27. Among the many misrepresentations presented to Judge Forman by Defendant Toolan and Mr. Ruback his attorney, the most important is their implication that the Vanderbilt Order exonerates defendants Toolan and Romond of all misconduct up to and including October 15, 1953, this in itself was a direct misrepresentation since the hearing before the Bar Examiners had ended on October 18, 1952, and this body, by Order of Chief Judge Vanderbilt, had been forbidden to take up any Court matters of a later date than those up to the end of 1948. Therefore, even had the Bar Examiners' Report been based on material facts and in accordance with the evidence produced before them, the Order dated October 1953 deliberately pretended that Mr. Toolan and Mr. Romond had been exonerated of all wrong-doing to that date, but a short period before the Plaintiff's appeal was made to the Federal Courts. Obviously Mr. Vanderbilt did not write the Order and also obviously Mr. Vanderbilt did not expect this order to be submitted to the Federal Courts as evidence certifying to the exoneration of Mr. Toolan and Mr. Romond beyond the date of the Complaints submitted to the Mercer County Ethics and Grievance Committee in March *1950,* following an appearance before the United States Senate Crime Investigating Committee in 1950. The Seiz custody action was already notorious and the Mercer County Ethics and Grievance Committee immediately started their investigation.

Without any warning, they were served with an Order ordering them to turn the Complaints over to Mr. Toolans stronghold, Middlesex County Ethics and Grievance Committee, and these gentlemen started their investigation immediately and we were con-

stantly called by them for questioning. Finally we were called and informed that this Committee refused to reach any definite Opinion, stating that most of the unethical conduct had happened before the Judges and these should be the ones to take action against Mr. Toolan and Romond. It was therefore, according to New Jersey procedure, up to the N. J. Supreme Court to take over the investigation.

Instead again Mr. Vanderbilt removed the documents to a Group of Bar Examiners (a never before heard of procedure) in Camden—this group and one other group refused to accept the Complaints, openly *stating they feared reprisals* should they expose anything not to Mr. Toolan's liking. (the same fear having been given as the reason for their refusal to go on with a case where they felt the decision was against them even before they had started the hearing by every one of the capable and honorable attorneys who had been part of the Seitz litigation with whom the Seitz family are still on the most friendly terms).

The Complaints were then removed by the Supreme Court to another Board of Bar Examiners who also refused to act in what they stated was a field with which they were not familiar enough to warrant their coming to important decisions, and finally Mr. Vanderbilt selected a five member group.

28. This hearing took place in the fall of 1952 almost two years after the complaints had been filed with the Mercer County Ethics and Grievance Committee at the suggestion of Mr. Parsons following a talk with, (he said with Mr. Vanderbilt) following our having appeared, at the suggestion of certain United States Senators et als, before the U. S. Senate

Crime Investigating Committee, and decided to make said Complaints to New Jersey Ethics and Grievance Committees in 1950. For, in New Jersey there were few lawyers connected with the Courts who were not aware of Mr. Burton's mysterious appearance in the Seitz litigation at a crucial point of the trial of the case and of his malfeasance during the hearing followed by his refusal to have the transcription of the Re-hearing made until months after he had published his opinion, which the slightest comparison with the Volume I, II, and III of said re-hearing, shows was almost entirely composed of statements contrary to the proofs produced and containing false material facts of tremendous importance to the litigants (see Burton Opinion attached to Mr. Toolan's presentation of his affidavits on page 27a as exhibit #1, of Appen. to Appel. Brief. U. S. Circuit Court of Appeals, 3rd circuit #11759, or, since by order of a higher Court Mr. Bigelow's Opinion (of Panel "A") was published on page I of Volume I of the Appen. to Appel. Brief sat below Burton, followed immediately by the false Opinion of Mr. Burton made without reference to the Transcript of the Re-Hearing, and, to make such desired comparison easy for the Court on second Appeal, the transcription, of the testimony etc. produced at the Re-Hearing, was published immediately following Mr. Burton's Opinion, also in Volume I of the Appellants Appendix. This was done on the natural assumption that the Appeal from the Re-hearing by Burton, would be assigned to Panel "A" the original Justices, Bigelow, Eastward and presently Associate Justice of the Supreme Court of N. J., who, by virtue of their exhaustive investigation before ordering the re-hearing were thoroughly familiar with the original back-

ground of the *Seitz* v. *Seitz* case (see Bigelow Opinion starting page I, of Volume I),). The second appeal however, just as mysteriously as Mr. Burton had succeeded Judge McLean, the second appeal was assigned to Panel "B", entirely unfamiliar with the Seitz litigation, which Panel "B" was so impressed by Mr. Burton's insidious and defamatory characterization of Helen G. Seitz and other statements therein containing false material facts, and by Mr. Toolan's oral argument and Brief wherein—despite the directives of Panel "A" forbidding the further introduction of the anonymous letter in the Re-hearing ordered by them, Mr. Toolan deliberately attached said anonymous letter, and as shown on pages 17 and 18 of said Brief and as set forth in Mr. Moser's memorandum to the Supreme Court relative to the Bar Examiner hearing, on page 12, Mr. Toolan wrote:

> "We respectfully ask the Judges who will read this Brief to read this letter at this time. It will give an insight into Mrs. Seitz' mental and emotional make-up."

Mr. Moser's comment on the same page of his memorandum is:

> "It is difficult for Mr. Toolan and Mr. Romond to assert that they were not accusing Mrs. Seitz of writing the anonymous letter in the light of the foregoing statement."

and

> "How can a letter Mrs. Seitz did not write give an insight into her mental and emotional make-up?"

all of which contradicts the statement in the Board of Bar Examiners' Report, submitted to Mr. Vander-

bilt, on page 18a Appen. to Appel. Brief U. S. S. Court of Appeals, in Mr. Toolan's affidavit submitted to Judge Forman:

> "* * *. The Complainant's fail to produce any affidavit by him or any Record in any Court or any positive evidence of any kind which could be fairly regarded that he ever made such an accusation against Mrs. Seitz".

To further contradict the 1952 false assertion set forth above by the Board of Bar Examiners to Mr. Vanderbilt, the transcript of the Re-hearing before Mr. Burton is replete with evidence that Mr. Toolan not only reintroduced the anonymous 1942 letter and attributed its authorship to Mrs. Seitz in 1949, but actually was exposed before Mr. Burton as having perpetrated fraud upon this Court by placing a false document into the Record to obstruct justice (on page 359 L 10) when opposing attorneys placed before the Court and entered into evidence the original handwritten anonymous letter (on page 376, L 25 also in Volume II of Appen. to Appel. Brief below Burton) said appendix being before the Board of Bar Examiners at the time of their above mentioned investigation.

In paragraph 21 of this present petition to the Supreme Court of U. S. there appears a complete description of how Mr. *Toolan's deposition made in February 1956* reveals the truth of the statement that he had been exposed as having committed fraud upon the Court in March 1949 by reason of the perjurious document referred to and the same paragraph calls attention to his having admitted in his

1956 Deposition that Mr. Toolan admitted that he had "introduced these 1948 (1948) documents in order to show the Courts of N. J. the "type of character she was" and further defamatory remarks.

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29. An outstanding evidence of deliberate perpetration of fraud which can by no stretch of the imagination be construed as being condoned by the Vanderbilt Order since the events described took place on *May 17, 1954* and are revealed only by the transcript of said hearing (supported by oral testimony) which, despite numerous requests, was not received by the attorney for the Plaintiffs until *after* the Appeal to the Circuit Court, two years later.

On May 17, 1954 the first and only *hearing* on C. A. 1046-53 at which defendant Toolan and his attorneys and Plaintiff Helen G. Seitz and her attorney were present and which ended in an unethical manner due to Mr. Palmer's unsuspected but immediate need for a serious brain operation, which operation took place shortly thereafter necessitating his absence from all Court cases for many months, the following occurred.

In an attempt to wrest the custody of the infant plaintiff from the State of Florida of which he was a Ward by virtue of a Florida divorce and award of custody to the father, obtained in *March 1953* (on submission of testimony from the transcripts of the Burton rehearing), Mr. Ruback read at length and introduced into evidence the papers granting a divorce in New Jersey in *August 1953* to defendant Isabel Seitz (which was obtained upon false affidavits and at which divorce hearing Attorney Gottschalk appeared for the second time, as a "friend of the Court"

to submit proof that fraud was being perpetrated but was denied opportunity to present the irrefutable photostatic evidence that the attorneys for Isabel Seitz had resorted to the presentation of fraudulent documents to the Florida Court in an effort to have the Florida Divorce voided and the custody of the infant plaintiff returned to New Jersey, but the Florida Courts replied that the papers were irrelevant and ordered same expunged from the record having established to its satisfaction from a comparison of the Burton Opinion with the three volumes of transcripts, that defendant Isabel Seitz, not the father, was the deserter and that the welfare of the infant plaintiff was dependent on his being in the custody of the father, who had obtained his Florida divorce only to protect the infant plaintiff from further brutal incarceration by Mr. Toolan et als. in order to accomplish the boy's loss of memory of what had been perpetrated upon him prior to, during and after the Burton Re-Hearing.

When attorney Palmer suddenly produced and introduced into evidence photostatic copies of the Florida's replies to the New Jersey attempt to perpetrate fraud on the State of Florida, Mr. Ruback dashed to the front, interrupted Mr. Palmer and demanded that his fraudulent presentation be erased from the C. A. 1046-53 Record, "actually erased by an eraser", visually demonstrating how he wanted this done.

The importance of the foregoing lies in the facts: (a) that the transcript not being available until "it was too late for use" and because the two year lapse of time had undoubtedly caused Judge Forman to forget this matter and the important fact that Mr.

Ruback and Mr. Toolan et als. had, at the inception of the litigation before him perpetrated fraud upon him, which can only be fully clarified by oral testimony; (b) that it demonstrated to what lengths defendant Toolan will go to cover his former misdeeds and (c) that it is most essential to the efforts of the infant plaintiff to remove the stigma of being an individual who would become an inmate of either a penal or mental institution, or

> "One of the worst delinquents this country ever produced"

as stated from the bench by Judge McLean on January 18, 1952 according to the transcript of that date.

30. It is again contended that Judge Forman erred by not permitting C. A. 1046-53 to go to trial by Jury because his attention had been called, numerous times to the fact that said charges could only be proven in their entirety by voluminous evidence, oral testimony and cross examination. The Motion by defendants for summary judgment, in effect, endeavored to deprive the Plaintiffs of their Right to a trial by jury and it is obviously an attempt to try the case piece-meal, by way of depositions. The law is well settled to the effect that a Motion for Summary Judgment cannot be made a substitute for a trial and that a party cannot be compelled to submit his evidence in the form of affidavits.

Most illustrative in the present instance is "*Arnstein* v. *Porter,* 154 Fed. 2d 464, the Court at page 471, stating as follows:

> "* * * We think that Rule 56 was not designed thus to foreclose plaintiff's privilege of examining

defendant at a trial, especially as to matters peculiarly within defendant's knowledge. Illustrative of the dangers, in this respect, of summary judgments if not cautiously employed, is a recent case in the Court below. There the Judge refused to grant summary judgment for defendants, despite a mass of impressive affidavits containing copies of corporate records, the accuracy of which plaintiffs did not deny in their affidavits, and which on their face made plaintiff's case seem nothing but a sham; at the trial, however, cross examination of the defendants revealed facts, theretofore unknown by plaintiffs, that so riddled the defendant's case as it had previously appeared on the summary judgment motion that the Judge entered judgment against them for several million dollars, from which they did not appeal.

We do not believe that, in a case in which the decision must turn on the reliability of witnesses, the Supreme Court, by authorizing summary judgments intended to permit a 'trial by affidavits,' if either party objects. That procedure which, so the historians tell us, began to be outmoded at Common-law in the 16th Century, would, if now revised, often favor unduly the party with the more ingenious and better paid lawyer. Grave injustice might easily result."

31. It is respectfully submitted that the description of the case referred to in the just quoted Opinion is so analogous to Civil Action 1046-53 that it might almost be a verbatim description of the latter. Neither Judge Forman nor any other Court could fail to be impressed by the affidavits and certain other exhibits

submitted by the defendants "which on their face made the plaintiffs' case seem nothing but a sham".

No matter how serious might be the charges presented by the plaintiffs, no Co[illegible]—in the light of an Order, dated October 15, 1953, signed by Arthur T. Vanderbilt, Chief Justice of the Supreme Court of the State of New Jersey (Nation renowned for his integrity, meticulous attention to detail and lifelong devotion to the study of the Law and it's effect upon the human race regardless of Statute), apparently exonerating the defendants, John E. Toolan and Huyler E. Romond, prominent criminal lawyers, of all charges of behavior contrary to Rules of Law and the Canons of Professional Ethics, almost to the date of the filing of Plaintiffs' Original Complaint 1046-53, dated December 31, 1953—could fail to take cognizance thereof, render summary judgment and dismiss the plaintiffs' Complaint without the trial by Jury requested.

This is what happened in Case 1046-53 yet it is the respectful, sincere and serious contention that were the plaintiffs therein granted a trial by Jury, even the aforementioned apparently insurmountable and unique hurdle could, very definitely and without offense to Chief Justice Vanderbilt and the Associate Justices of the New Jersey Supreme Court, be overcome by oral testimony and the exhibition of certain evidence in connection with such testimony.

32. Reverting to paragraph 26 wherein is set forth that the original Complaints of 1950 originally presented to the Mercer County Ethics and Grievance Company for practical reasons in addition to this

Committee being an absolutely neutral County Committee, and perfectly willing to investigate the charges against Mr. Toolan, Romond and advisory master Burton, had finally come to hearing before a Board of Bar Examiners in 1952, who, prior to the opening of the hearing stated they were unfamiliar with the procedure of Ethics and Grievance complaints. It must be stated that although these complaints were made because of malfeasance and "wrong-doings" perpetrated by Toolan and Romond and Mr. Burton resulting in *the erroneous affirmation by Panel "B" of the Appellate Court brought into being entirely by the perjurious presentations to them in the Opinion of Mr. Burton and the Brief of Mr. Toolan so skillfully and convincingly contrived that, even knowing the facts, one is almost led into believing the lies and frauds they perpetrated, causing these honorable Justices to arrive at their erroneous and unjust decisions by reason of their being convinced of the integrity of Mr. Toolan and Mr. Burton, as is shown by their Opinion wherein Mr. Colie merely stated:*

> "It will serve no useful purpose to review the facts in the Record;"

said Opinion having been written on December 21, 1949—at the height of the Christmas season and during the year end rush to clear the calendar as far as possible during the first years' operation of the new Court Structure, the appeal having been made on December 12, 1949, 9 days prior thereto.

Mr. Richard Moser, former counsel to the U. S. Senate Crime Investigating Committee represented Helen G. Seitz and the father of the infant children at the hearing before the Board of Bar Examiners in

1952 and an examination of the transcription shows that no doubt will be left in the minds of the readers that Mr. Moser proved both Mr. Toolan and Mr. Romond to be a disgrace to the Bar both as to their disregard for the Canons of Professional Ethics and as had been complained of by other attorneys, a menace even in the Court room, Mr. Moser reporting in his memorandum to the New Jersey Supreme Court that when Mr. Toolan was exposed of deliberately perpetrated fraud and false statements and/or having submitted false affidavits, even one signed by him, to the Courts throughout the Seitz litigation, he attempted to assault Mr. Moser, counsel for the Complainants, "in open Court, and was only prevented from so doing by the forcible intervention of his own counsel." It is of course obvious that neither Mr. Vanderbilt nor the Associate Justices of the N. J. Supreme Court, could have been apprised of either what had transpired during the Board of Bar Examiner Hearing, or of Mr. Toolan's own admissions under oath that he *had*, together with Mr. Romond (pages 214 thru 224 of the Bar. Exam. Transcripts) conspired in the preparation of fraudulent affidavits, one actually signed by Mr. Toolan at the inception of the case (with evil intent) and certainly not of Mr. Moser's charges of attempted assault set forth in Mr. Moser's memorandum of December 6, 1952, addressed to the Supreme Court.

It is inconceivable that had the Supreme Court of New Jersey been fully informed of all that transpired at the hearing, whereat in addition to several attempted assaults on Mr. Moser, the wire recorder placed there by Mr. Vanderbilt's order, was deliberately wrecked, witnesses were intimidated, some of

them actually having been suborned and other atrocious and unethical conduct was indulged in,—that Court would have confirmed the Bar Examiner's Report, but all this can only be brought to light by oral testimony.

No recognized Ethics and Grievance ever investigated the Complaint or Burton Opinion falsely affirmed by Panel B.

Accordingly, when after numerous appeals to obtain an investigation or even a correction of the implication in the Vanderbilt affirmation as to the date of the Toolan exoneration, finally resulting in a letter signed by John H. Gildae, Clerk, stating that nothing would be done "at this time", plaintiff Helen G. Seitz became convinced that it was impossible to obtain Justice in the State of New Jersey and filed Civil Action 1046-53.

33. As just shown the most important "Stumbling block to Justice" was the certainly unintended implication in Mr. Vanderbilt's Order that defendants Toolan and Romond had been exonerated of every Charge in Complaint C. A. 1046-53 to October 15, 1953, two months prior to the filing of said C. A. 1046-53 (since the Order dated October 15, 1953 failed to state that the hearing had taken place in October 1952 a full year before and further makes no mention of the date on which the Complaints against Mr. Toolan and Mr. Romond had been filed which was early in 1951 almost two years before). This *unintentional* implication in the Order enabled Mr. Toolan and his attorneys to make the *deliberate* misrepresentation to Judge Forman that defendants Toolan and Romond had been "fully" exonerated as aforementioned, and later to the Circuit Court.

34. Since the Complaints originally made to the Mercer County and Grievance Committee early in 1951 were necessarily confined to misconduct prior to that time and since Mr. Vanderbilt had limited the investigation by the Bar Examiners to misconduct prior to the Burton Rehearing of March 1949 and forbidden Mr. Burton made a party to the Seitz Complaints against Mr. Toolan and Mr. Romond, the grave importance of Mr. Vanderbilt's "unintentional implication" becomes of the utmost significance. For that reason the Order has been dwelt upon at length so that the Supreme Court of the United States may not equally be imposed upon.

35. Among the many *deliberate* misrepresentations in Mr. Ruback's Briefs probably second in importance to the Vanderbilt Order is the oft repeated implication that the Panel of Justices of the New Jersey Appellate Court which *reversed* Judge McLean on the first Appeal and the Panel which *affirmed* Advisory Master Burton on the second Appeal were identical which is untrue.

36. Reference is now made to the final Opinion written by Mr. William J. Brennan Jr. as an Associate Justice of the Supreme Court of the State of New Jersey just prior to his becoming an Associate Justice of the Supreme Court of the United States on October 15, 1956.

That widely publicized opinion delivered the majority opinion of the Court in connection with the disbarment of former Advisory Master Dougal Herr. Referring to the "Duty of the Bar", Mr. Brennan stated·

"There is no profession, save perhaps the min-

istry, in which the highest morality is more necessary than that of the Law. It has been very aptly said that there is no profession apart from the legal profession where there is greater disparity between true character and reputation."

"The fault lies in the lack of understanding by the public principally provoked by the transgressors among us—not so much by the flagrant violators, because the public is quick to appreciate the inevitableness of their existence, but by those members (of the Bar) who by unconscionable conduct tip the delicate balance in which trust and confidence in a lawyer's actions hangs; not so much by malefactions which are branded criminal but those that are in the twilight zone of morality."

"We discipline not to punish but to purify the Bar, to increase it's reputation and to protect the public and the Courts from fraud and imposition."

Reference is now made to Mr. Moser's memorandum dated September 6, 1952, addressed to the Supreme Court of the State of New Jersey entitled "Memorandum for Complainants in the matter of Huyler E. Romond and John E. Toolan attorneys at law." On pages 6 and 7 thereof Mr. Moser outlines the acts perpetrated by Mr. Toolan and Mr. Romond in violation of the Canons of Professional Ethics, stating in part:

"III. *Unethical Conduct of Mr. Toolan and Mr. Romond.*

The conduct of Mr. Toolan and Mr. Romond

that will be discussed in this memorandum is as follows:

(1) The Anonymous Letter. The attorneys as part of their attack on Mrs. Seitz accused her of being the author of a vicious anonymous letter. This accusation was unjustified and false and was designed to prejudice the Court against her and her son."

Beginning at the bottom of page 7 and continuing on pages 8, 9, 10, 11 and 12, Mr. Moser shows the falsity of the accusations and beginning on page 12 and concluding on page 13, Mr. Moser states:

"At the hearing before the Bar Examiners, the argument in favor of the conduct of these lawyers in respect to the anonymous letter seems to be as follows:

'Even though the foregoing affidavits and briefs may have carried the distant implication that Mrs. Seitz was accused of writing the anonymous letter, they contained no specific and unequivocal statement to that effect. If a statement made by the lawyers is susceptible of any possible interpretation that is not false, they should be exonerated irrespective of the fact that they created a factual impression that was false.'"

"It is submitted that if this is the standard of a lawyer's responsibility, the legal profession can hardly expect to gain the respect of the Courts or of the public. A lawyer, especially in a Custody Proceeding where the very highest standards of honor, integrity and candor ought to prevail, should be bound by the natural interpreta-

tion that would ordinarily be placed upon his words. He should not be excused merely because by a clever selection of words he makes a statement that is technically correct but which creates a false impression as to the facts of the case."

"In this case the statements made by Mr. Toolan and Mr. Romond were intended to and did carry the clear implication of fact that Mrs. Seitz was the author of the anonymous letter. This charge was false."

Inasmuch as it cannot be denied that the conduct of Mr. Toolan and Mr. Romond, regardless of how, when or why they were "exonerated", definitely falls within the "twilight zone of morality" so deplored by Mr. Justice Brennan and reveals the "disparity between true character and reputation", it is respectfully submitted that Plaintiffs herein should be permitted the widest latitude to enable them to prove the truth or falsity of their charges.

Petitioner hopes and prays this Honorable Court will realize that her appearance suddenly at the eleventh hour as an attorney pro se, was entirely because of an immediate necessity to act in the hope of securing the aid of these Honorable Justices to prevent a further delay in securing Justice at this time for a small boy, because his very life and continued normal development is dependent upon securing aid to prevent his return to conditions which must undo all he has so far accomplished under tremendous handicaps.

WHEREFORE, petitioner respectfully prays that a petition for re-hearing be granted and that upon such re-hearing a writ to review the judgment of the Court of Appeals be issued by this Honorable Court.

Dated, November 1, 1956.

HELEN G. SEITZ,
Attorney Pro Se.

HELEN G. SEITZ hereby certifies that the instant petition is presented in good faith and not for delay and that the petition is restricted, to the best of her knowledge, to the grounds as enumerated in Rule 58, subdivision (2) of the Rules of the Supreme Court of the United States, but asks that the Court make allowance for the fact that this is an extreme and abnormal case and unique in the annals of Court history.

HELEN G. SEITZ,
Attorney Pro Se.